TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1903.

No. 155.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED AUGUST 26, 1902.

(18,251.)

(18,251.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 398.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1901.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the State of California and to the said supreme court, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a cause which is in the said supreme court, before you, between The People of the State of California and John E. Sexton, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington in the District of Columbia, on the 30th day of May A. D. 1901, in the Supreme Court of the United States, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 1st day of April in the year of our Lord one thousand nine hundred and one.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States,
Northern District of California.

2 The foregoing writ of error is hereby allowed, and it is ordered that a supersedeas upon the judgment in said writ mentioned be, and the same is hereby granted.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Dated at San Francisco this 30th day of March A. D. 1901.

3 [Endorsed:] Crim. 657 Original. John E. Sexton plaintiff in error *vs.* The People of the State of California defendant in error. Writ of error. Filed Apr. 1 1901 Geo. W. Root, clerk. By W. E. Boody deputy. George D. Collins, 21–22 Crocker bldg., San Francisco, Cal., attorney for John E. Sexton plaintiff in error.

4 *Transcript of Record.*

Error to the supreme court of the State of California.

Supreme Court of the State of California, *ss.*

Return to Writ of Error.

The answer of the chief justice and associate justices of the supreme court of the State of California.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our supreme court of the State of California, within mentioned, at the day and place within contained, as we are commanded by the annexed writ of error.

By the court.

[Seal Supreme Court of California.]

GEO. W. ROOT,
Clerk of the Supreme Court of the State of California.
W. E. BOODY, *Deputy.*

5 *Indictment for Extortion.*

In the Superior Court of the County of El Dorado, State of California, the 25th Day of November, A. D. 1899.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOHN E. SEXTON and S. H. BRIGGS.

John E. Sexton and S. H. Briggs are accused by the grand jury of the said county of El Dorado, by this indictment, of the crime of extortion, committed as follows, to wit: The said John E. Sexton and S. H. Briggs, prior to the finding of this indictment, on or about the 20th day of June, A. D. 1898, at the county of El Dorado, State of California, did willfully, unlawfully and feloniously obtain from one C. Greenwald certain personal property consisting of money, the property of the said C. Greenwald, to the amount and value of thirty dollars with the consent of said Greenwald induced by the wrongful use and exercise upon him of fear by means of a threat then and there made by the said John E. Sexton and S. H. Briggs to accuse him, the said Greenwald, of the crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

ABE DARLINGTON,
District Attorney.

Witnesses sworn and examined before the grand jury: C.
6 Greenwald, I. Jacobs, Kate Thompson and John E. Sexton.

Endorsed: 1256. In the superior court of El Dorado, State of California. The People of the State of California against John E. Sexton and S. H. Briggs. Indictment for extortion. A true bill. R. P. Patterson, foreman of the grand jury. Presented and filed in open superior court on this the 25th day of November, 1899. John P. Fisher, clerk.

7 *Motion to Set Aside Indictment.*

In the Superior Court of the County of El Dorado, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA }
vs.
JOHN E. SEXTON and S. H. BRIGGS. }

Now comes the defendant John E. Sexton, one of the defendants, and moves the court to set aside the indictment heretofore filed in the above-entitled cause and as grounds allege:

1. That said indictment was not found, endorsed and presented as provided by the penal code.
2. That the names of the witnesses examined before the grand jury are not endorsed at the foot of the indictment.
3. That at least twelve jurors did not concur in finding the said indictment.
4. That said indictment or presentment was not presented by the foreman in the presence of the grand jury before being filed with the clerk.
5. That the grand jury which found said indictment was not selected, empannelled or drawn as provided by law.
6. That the requisite number of ballots was not drawn from the jury-box of the county.
7. That notice of the drawing of the grand jury was not given.
8. That the drawing was not had in the presence of the officers designated by law.
9. That this court has no jurisdiction of the offense charged in the indictment nor of the person of the defendant.

9. That the property alleged to have been acquired is not
8 described.

Wherefore defendant prays that said indictment be set aside and that he be hence dismissed.

F. ADAMS,
Attorney for Defendant.

(Endorsed:) 1256. In the superior court of the county of El Dorado, State of California. The People of the State of California *vs.* John E. Sexton and S. H. Briggs. Motion to set aside. Filed Dec. 4, 1899. John P. Fisher, clerk.

9 *Order Denying Motion to Set Aside Indictment.*

MONDAY, *December 4th*, 1899.

Present: Hon. M. P. Bennett, judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOHN E. SEXTON and S. H. BRIGGS.

The defendant John E. Sexton with his counsel F. Adams and the defendant S. H. Briggs with his counsel Chas. A. Swisler and the district attorney, came into court.

The defendant Sexton, by his counsel, on a motion filed November 20th, 1899, moves the court to dismiss the cause therein specified upon the grounds in said motion mentioned. The court declined to hear the motion on the ground that the matter before the court was the answer of said defendant to the indictment pending and required said defendant to proceed with his answer to said indictment, to which ruling defendant excepts.

Motion to set aside indictment filed by defendant Secton, said motion denied by the court, exception by defendant Sexton.

10 *Judgment of the Superior Court in and for the County of El Dorado, State of California.*

In the Superior Court of the County of El Dorado, State of California.

FRIDAY, *February 2nd*, 1900.

Present: Hon. M. P. Bennett, judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
JOHN E. SEXTON and S. H. BRIGGS. } Extortion.

The district attorney, with the defendant John E. Sexton with his counsel, F. Adams, came into court. The defendant was duly informed of the nature of the indictment found against him, and filed in the superior court of the county of El Dorado, State of California, on the 25th day of November 1899, for the crime of extortion committed on or about the 20th day of June, 1898, of his arraignment and plea of: -

"Not guilty of the offense charged in the indictment and his plea that he has been once in jeopardy for the offense charged in this indictment during the years 1898 and 1899 in the superior court of the county of El Dorado, State of California, at Placerville, in said county of El Dorado, under an indictment filed in this court against S. H. Briggs and this defendant on the 15th day of December, 1898, which indictment was pending in said court from said last-mentioned day until January 25th, 1899, on which last-named day a demurrer interposed by this defendant to said indictment was sustained by the court."

Of his trial and the verdict of the jury rendered on the 25th day of January, 1900, in the words following:

11 In the Superior Court of the County of El Dorado, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs,
vs.
JOHN E. SEXTON and S. H. BRIGGS, Defendants.

We the jury in the above-entitled action find the defendant John E. Sexton guilty as charged in the indictment. Upon his plea that he has been once in jeopardy for the offense charged in this indictment during the years 1898 and 1899 in the superior court of the county of El Dorado, State of California, at Placerville, in the said county of El Dorado, under an indictment filed in this court against said defendants on the 15th day of December, 1898, which indictment was pending in said court from said last-mentioned day until January 24th, 1899, on which last-named day a demurrer interposed by this defendant, John E. Sexton, to said indictment was sustained by the court, we find for the people.

M. B. BAXTER, *Foreman.*

The said defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, in reply to which said defendant moved for a new trial, which motion was by the court denied and disallowed, whereupon defendant moved in arrest of judgment, which motion was by the court denied and disallowed, and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment.

That whereas the said John E. Sexton having been duly convicted in this court of the crime of extortion.

12 It is therefore ordered, adjudged and decreed that the said John E. Sexton be punished by imprisonment in the State prison of the State of California at Folsom, for the term of two years.

The said defendant was then remanded to the custody of the sheriff of said county, to be by him delivered into the custody of the proper officers of the said State prison of the State of California at Folsom.

(Endorsed:) 1256. In the superior court of the county of El Dorado, State of California. The People of the State of California *vs.* John E. Sexton and S. H. Briggs. Judgment. Filed, February 2, 1900. John B. Fisher, clerk. B. 342.

13 *Notice of Appeal.*

In the Superior Court of the County of El Dorado, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOHN E. SEXTON and S. H. BRIGGS.

To the superior court of the county of El Dorado, State of California, and Abe Darlington, Esq., district attorney of said county:

You will please take notice that the defendant John E. Sexton, appeals to the supreme court of the State of California, from the order of the superior court of the county of El Dorado, State of California, made and entered on the 2nd day of February A. D. 1900, denying said defendant's motion for a new trial.

And said defendant appeals from the order of the superior court of the county of El Dorado, State of California, made on the 2nd day of February, A. D. 1900, denying said defendant's motion in arrest of judgment.

And said defendant appeals from the judgment of the superior court of the county of El Dorado, State of California, made and entered against him by said court herein on the 2nd day of February, A. D. 1900, sentencing him to be imprisoned in the State prison of this State, at Folsom, for the term of two years, and from the whole thereof. Said appeal is taken upon questions of law and errors of law arising during the trial of said action, which are specified in bills of exceptions on file in said cause, and bills of exceptions to be prepared, settled and allowed herein, and upon the papers and records of said case.

14 Dated this 2nd day of February, A. D. 1900.

F. ADAMS,
J. W. KEYES,
CLARKE HOWARD,
Attorneys for Defendant Sexton.

Service of a copy of the within is admitted this 5th day of February, A. D. 1900.

ABE DARLINGTON,
District Attorney.

(Endorsed:) Filed February 5th, 1900. John P. Fisher, clerk.

15 *Opinion of the Supreme Court of the State of California.*

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent,
vs.
JOHN E. SEXTON, Appellant.
Crim. No. 651.

Defendant has been convicted of the crime of extortion and appeals to this court. By the indictment it was alleged that defend-

ant obtained thirty dollars from one Greenwald under fear induced by threats upon the part of defendant to accuse him (Greenwald) of the "crime of having in violation of the laws of the United States of America sold and delivered cigars in a form other than in a new box not before used for the purposes of packing cigars therein." In substance it may be said that defendant threatened to accuse Greenwald of violating the United States revenue laws and under fear induced by such threat secured from Greenwald the aforesaid sum of $30.

It is insisted that the facts alleged do not constitute an offense against the laws of the State of California, but upon the contrary, constitute a crime exclusively within the jurisdiction of the Federal court. We find nothing in this contention. The defendant is charged with the crime of extortion, an offense directly within the jurisdiction of the State courts. He is not charged with a violation of a Federal statute, but with a violation of a State statute. He
16 threatens to accuse a man with the commission of a crime. It makes no difference if that crime be one solely triable in the Federal courts, for defendant is not being tried for that crime. If he had threatened to have Greenwald arrested upon the charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offence would be one against the laws of this State. It would be extortion as defined by the penal code of this State, and this court would not be concerned as to whether or not defendant's crime was also punishable under Federal laws. The court finds no substantial defect in the indictment, and the demurrer thereto is not well taken.

A demurrer to a previous indictment against defendant was sustained and the case referred to a second grand jury, which grand jury returned the indictment now before the court. It is insisted that defendant's second prosecution should have been based upon a preliminary examination, and an information filed thereon. There is no merit in this position. When section 1008 of the Penal Code says that after such order of resubmission the defendant "may be examined before a magistrate," the word "may" takes its usual, ordinary meaning, and is not to be construed as must.

The stenographer who was present and took the testimony before the grand jury was sworn as a witness and testified as to certain evidence given by defendant before that body. This evidence in no sense amounted to a confession, and hence no question of duress or menace upon the part of defendant at the time he gave his testimony is involved herein. Under such circumstances defendant's statements, whether made in the grand jury room, at the trial, or extrajudicial, may be used against him, and we see no error
17 in their admission here. The stenographer had the right to read from her notes of his evidence taken at the time, if she was so inclined. The statute contemplates that she may thus refresh her recollection. (Section 2047, C. C. P.; Burbank *vs.* Dennia, 101 Cal., 104.)

We find nothing further in the record demanding consideration. While the evidence tending to support the evidence in this case is

very weak, we are not prepared to say it is insufficient. Owing to the peculiar circumstances of the case and the character of the evidence relied upon to support the verdict, we think the law would have been well satisfied with a judgment finding the defendant guilty of a misdemeanor.

W. E. B.

But that is a matter beyond review by this court.

For the foregoing reasons the judgment and order are affirmed.

GAROUTTE, J.

We concur:

VAN DYKE, J.

HARRISON, J.

Filed, February 26, 1901.

18 *Judgment of the Supreme Court of the State of California.*

FEB. 26, '01.

PEOPLE, ETC., Respondent, vs. JOHN E. SEXTON, Appellant. } Crim. No. 651. Dept. 1. On Appeal from the Superior Court in and for the County of El Dorado.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen, heard, understood and fully considered, the opinion of the court herein is delivered by Garoutte, J. We concur: Van Dyke, J., Henshaw, J.

Whereupon it is now considered, ordered, adjudged and decreed by the court here, that the judgment and order of the superior court in and for the county of El Dorado in the above-entitled cause, be and the same are hereby affirmed.

Remittitur issued, March 29, '01.

19 *Order of the Supreme Court of the State of California Denying Rehearing.*

In the Supreme Court of the State of California. In Banc.

PEOPLE vs. SEXTON. } Crim. No. 659.

By the court:

Rehearing denied, March 28, 1901.

(Endorsed:) Filed Mar. 28, 1901. Geo. W. Root, clerk, by Geo. H. Ryan, deputy.

20 *Petition for Writ of Error and Order Allowing Writ.*

PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOHN E. SEXTON. } Crim. No. 651.

To the Honorable W. H. Beatty, chief justice of the supreme court of the State of California:

The petition of John E. Sexton respectfully shows that on the 26th day of February A. D. 1901 the supreme court of the State of California rendered its judgment in the above-entitled cause, against your petitioner, and thereafter on the 28th day of March A. D. 1901 denied his petition for a rehearing.

That the People of the State of California are plaintiffs in said action and your petitioner the said John E. Sexton is the defendant therein.

That the said judgment of the supreme court of California is final, and is the decision in the highest court of the State in which a decision in said action could be had. That your petitioner claims a writ of error herein, against the said judgment upon the following grounds viz:

1. That the supreme court of the State of California committed manifest error in said action, in deciding therein that section five hundred and eighteen of the Penal Code of the State of California is not in conflict with and is not repugnant to the provisions of section one of article 3 and with section one of article 14 of the Constitution of the United States and with section 711 and section 5484 of the Revised Statutes of the United States.

2. That your petitioner, defendant in said action is by the
21 judgment of the superior court in and for the county of El Dorado, and by the said judgment of the supreme court of the State of California affirming said judgment of said superior court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of section one of article 14 of the Constitution of the United States.

All of which errors above enumerated appear affirmatively from the record and proceedings herein, to which reference is hereby made; that said errors are to the great damage of your petitioner and he therefore prays that he be allowed a writ of error herein and such other process as will enable him to obtain a review of the case and a correction of said errors by the Supreme Court of the United States; and your petitioner will ever pray etc.

GEORGE D. COLLINS,
Counsel for Petitioner, John E. Sexton.

Upon the foregoing petition it appears that the writ of error therein prayed for of right ought to issue. It is therefore ordered that said writ of error be, and the same hereby is allowed, the said writ to operate a supersedeas, and the petitioner John E. Sexton is ordered to furnish upon said writ a bond for costs and damages in

the penal sum of five hundred dollars and conditioned as prescribed by law.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Dated March 30th 1901.

(Endorsed:) Filed Mar. 30, 1901, Geo. W. Root, clerk By W. E. Boody, deputy clerk.

22 *Assignment of Errors.*

JOHN E. SEXTON, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

Of October term, in the year of our Lord one thousand nine hundred.

Afterwards, to wit, on the 30th day of March A. D. 1901, in the same term, before the justices of the Supreme Court of the United States, comes the said John E. Sexton, by Mr. George D. Collins his counsel, and says that in the record and proceedings in the action of The People of the State of California *vs.* John E. Sexton, crim. No. 651 in the supreme court of the State of California, there is manifest error in this to wit:

1. That the supreme court of the State of California committed manifest error in said action, in deciding therein that section five hundred and eighteen of the Penal Code of the State of California is not in conflict with and is not repugnant to the provisions of section one of article 3 and with section one of article 14 of the Constitution of the United States and with section 711 and section 5484 of the Revised Statutes of the United States.

2. That your petitioner, defendant in said action is by the judgment of the superior court in and for the county of Eldorado, and by the said judgment of the supreme court of the State of
23 California affirming said judgment of said superior court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of section one of article 14 of the Constitution of the United States.

Whereas by the law of the land, said judgment of the supreme court of the State of California ought to have been given for the said John E. Sexton, plaintiff in error, and against The People of the State of California, defendant in error; and the said plaintiff in error, the said John E. Sexton prays the judgment of the supreme court of the State of California, *to* be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he hath lost by occasion of the said judgment.

GEORGE D. COLLINS,
Attorney for Plaintiff in Error, John E. Sexton.

(Endorsed:) Filed Mar. 30, 1901 Geo. W. Root, clerk by W. E. Boody, deputy clerk.

24 *Citation on Writ of Error.*

The President of the United States to the People of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington in the District of Columbia on the 30th day of May, A. D. 1901, pursuant to a writ of error lodged in the clerk's office of the supreme court of the State of California wherein John E. Sexton is the plaintiff in error, and you are the defendant in error, to show cause if any there be, why the final judgment rendered against the said plaintiff in error, as in the said — error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. W. H. Beatty chief justice of the supreme court of the State of California this 30th day of March A. D. 1901, at the city and county of San Francisco, in the State of California.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Service of the foregoing citation upon The People of the State of California, the defendant in error is hereby certified to and admitted to have been made at the city and county of San Francisco, on the first day of April A. D. 1901, after lodgment of the writ of error as above stated.

TIREY L. FORD,
Attorney General of the State of California,
Attorney for Defendant in Error,
By A. A. MOORE, Jr., *Deputy.*

25 [Endorsed:] Crim. 651 Original John E. Sexton plaintiff in error *vs.* The People of the State of California defendant in error. Citation on writ of error. Filed Mar. 30 1901 Geo. W. Root, clerk. By W. E. Boody deputy. George D. Collins, 21–22 Crocker bldg., San Francisco, Cal., attorney for plaintiff in error.

26 In the Supreme Court of the State of California.

People of the State of California, Respondent, *vs.* John E. Sexton, Appellant.	Crim. No. 651.

Certificate.

It is hereby certified that in the above-entitled cause there was drawn in question before the supreme court of the State of California, and by the appellant John E. Sexton, the validity of section five hundred and eighteen of the Penal Code of the State of California and also the validity of the judgment of the superior court in and for the county of El Dorado in the case of The People of the State of

California plaintiff *vs.* John E. Sexton defendant, and also the validity of the judgment of the supreme court of the State of California in the above-entitled cause, on the grounds that the said provision of the Penal Code of said State, and the said judgment of the supreme court of the State of California and the said judgment of the said superior court in and for the county of El Dorado are repugnant to and in conflict with the provisions of section one of the fourteenth amendment of the Constitution of the United States and with section seven hundred and eleven and section five thousand four hundred and eighty-four of the Revised Statutes of the United States, and that by said judgment and by said judgment of the supreme court affirming said judgment of the superior court, the said John
27 E. Sexton is deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of section one of the fourteenth amendment of the Constitution of the United States.

And it is further certified that upon all said questions the decision of the supreme court of the State of California was in favor of the validity of said section five hundred and eighteen of the Penal Code of said State, and in favor of the validity of the judgment of the said supreme court and in favor of the validity of the said judgment of the said superior court in and for said county of El Dorado.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

28 [Endorsed:] Crim. No. 651. Supreme court State of California. People of the State of California respondent *vs.* John E. Sexton appellant. Certificate as to Federal questions. George D. Collins, 21–22 Crocker bldg., San Francisco, Cal., attorney for appellant.

29 *Certificate.*

In the Supreme Court of the State of California.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent,
vs.
JOHN E. SEXTON, Appellant.

It is hereby certified that John E. Sexton, the plaintiff in error, lodged in the office of the clerk of the supreme court of the State of California, on the 1st day of April, 1901, a true copy
W. E. B. of the writ of error, for the defendant in error, The People of the State of California.

GEO. W. ROOT,
Clerk of the Supreme Court of the State of California.
W. E. BOODY, *Deputy.*

30 *Clerk's Certificate to Transcript.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

I, George W. Root, clerk of the supreme court of the State of California, do hereby certify that the foregoing twenty-nine pages, numbered from one to 29, inclusive, are a true copy of the record, and of all proceedings in the cause mentioned in the annexed writ of error, and that the same constitute the return to said writ.

I further certify to the Supreme Court of the United States, on said writ of error, the annexed certificate of the supreme court of the State of California, signed by the chief justice thereof.

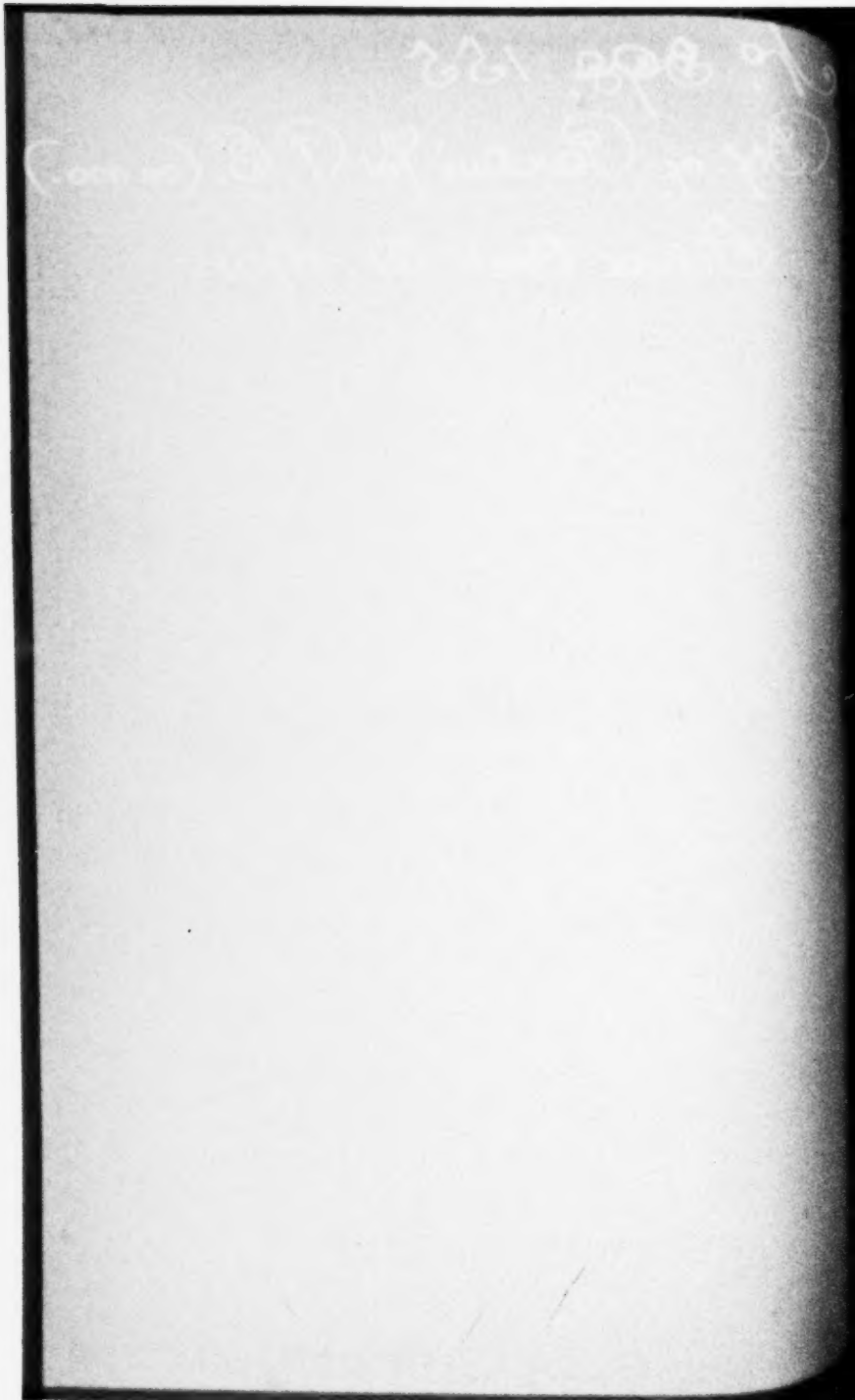
In witness whereof, I have hereunto set my hand and caused the seal of the said supreme court of the State of California to be affixed at San Francisco, this 12 day of August A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT,
Clerk of the Supreme Court of the State of California,
By W. E. BOODY, *Deputy.*

[Endorsed:] Supreme Court of the United States of America. John E. Sexton, plaintiff in error, *vs.* The People of the State of California, defendant in error. Transcript of record. Error to the supreme court of the State of California. George D. Collins, 21–22 Crocker bldg., San Francisco, Cal., attorney for plaintiff in error.

Endorsed on cover: File No. 18,251. California supreme court. Term No. 398. John E. Sexton, plaintiff in error, *vs.* The People of the State of California. Filed August 20th, 1901.



Supreme Court of the United States

OCTOBER TERM, 1901.

No. 398.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON MOTION TO DISMISS OR AFFIRM.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error was convicted under an indictment found by the grand jury of the county of El Dorado, in the State of California, which indictment is as follows (Record, fols. 5 and 6):

"IN THE SUPERIOR COURT OF THE COUNTY OF EL DORADO,
"STATE OF CALIFORNIA, THE 25TH DAY OF NOVEMBER,
"A. D. 1899.

"THE PEOPLE OF THE STATE OF CALIFORNIA }
vs.
"JOHN E. SEXTON and S. H. BRIGGS. }

"John E. Sexton and S. H. Briggs are accused by the "grand jury of said county of El Dorado, by this indictment, "of the crime of extortion, committed as follows, to wit:

"The said John E. Sexton and S. H. Briggs, prior to the "finding of this indictment, on or about the 20th day of "June A. D. 1898 at the county of El Dorado, State of Cali- "fornia, did willfully, unlawfully and feloniously obtain "from one C. Greenwald certain personal property consist- "ing of money, the property of said C. Greenwald, to the "amount and value of thirty dollars, with the consent of "said Greenwald induced by the wrongful use and exercise "upon him of fear by means of a threat then and there "made by the said John E. Sexton and S. H. Briggs to "accuse him the said Greenwald, of the crime of having, in "violation of the laws of the United States of America, sold "and delivered cigars in a form other than a new box not "before used for the purpose of packing cigars therein con- "trary to the form force and effect of the statute in such "case made, and provided, and against the peace and dignity "of the people of the State of California.

"ABE DARLINGTON,
"*District Attorney.*"

Endorsed: A true bill, &c. R. B. Patterson, foreman of the grand jury.

Sundry proceedings subsequent to said conviction were had, which are shown by the transcript, and, finally, the defendant was sentenced (folio 12) to be "punished by im-"prisonment in the State prison of the State of California at "Folsom, for the term of two years."

The plaintiff in error thereupon appealed to the supreme court of the State of California (folios 13, 14), by which court, after argument, the conviction was affirmed.

Plaintiff in error thereupon sued out a writ of error in this court, directed to the supreme court of the State of California, with citation thereon, and in due course the same was returned into this court and transcript filed.

The errors assigned are as follows, viz. (folios 22, 23):

1. That the supreme court of the State of California committed manifest error in said action in deciding that section five hundred and eighteen of the Penal Code of the State of California is not in conflict with and repugnant to the provisions of section 1 of article 3 and with section 1 of article 14 of the Constitution of the United States, and with section 711 and section 5484 of the Revised Statutes of the United States.

2. That defendant is, by the judgment of the superior court in and for the county of El Dorado and by the said judgment of the supreme court of the State of California, affirming said judgment of said superior court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of section 1, article 14, of the Constitution of the United States.

So much of the opinion of the supreme court of the State

of California as is material to the present issue is as follows, viz:

"Defendant has been convicted of the crime of extortion, "and appeals to this court. By the indictment it was "alleged that defendant obtained thirty dollars from one "Greenwald under fear induced by threats upon the part "of defendant to accuse him (Greenwald) of the 'crime of "having, in violation of the laws of the United States of "America, sold and delivered cigars other than in a new box "not before used for the purpose of packing cigars therein.' "In substance it may be said that defendant threatened to "accuse Greenwald of violating the United States revenue "laws, and under fear induced by such threats secured from "Greenwald the aforesaid sum of $30.

"It is insisted that the facts do not constitute an offense "against the laws of the State of California, but upon the "contrary constitute a crime exclusively within the juris- "diction of the Federal courts.

"We find nothing in this contention. The defendant is "charged with the crime of extortion, an offense directly "within the jurisdiction of the State courts. He is not "charged with a violation of a Federal statute, but with a "violation of a State statute. He threatens to accuse a man "with the commission of a crime. It makes no difference if "that crime be one solely triable in the Federal courts, for "defendant is not being tried for that crime.

"If he had threatened to have Greenwald arrested upon "the charge of counterfeiting the money of this country, and "was charged with the crime of extortion for that reason, "clearly his offense would be one against the laws of this "State.

"It would be extortion as defined by the penal code of this "State, and this court would not be concerned as to whether "or not defendant's crime was also punishable under Fed- "eral laws.

* * * * * *

"While the evidence tending to support the conviction in "this case is very weak, we are not prepared to say it is in- "sufficient. Owing to the peculiar circumstances of the case, "and the character of the evidence relied upon to support "the verdict, we think the law would have been well satisfied "with a judgment finding the defendant guilty of a misde- "meanor."

POINTS.

I.

Before proceeding to the consideration of the above errors we may be permitted to call the attention of this court to the language of the supreme court of California (to be found on page 8, folio 17), which is as follows:

"Owing to the peculiar circumstances of the case, and "character of the evidence relied upon to support the "verdict, we think the law would have been well satisfied "with a judgment finding the defendant guilty of a mis- "demeanor. But that is a matter beyond review by this "court."

It thus appears that this plaintiff in error is condemned to suffer for a crime of which *the supreme court of California does not deem him guilty.*

While it is true that this court is not, on that ground, to be called upon for a reversal of the action of the courts of the State of California, it is nevertheless a fact upon which this court may feel disposed not to rely upon mere technicality in the consideration of this case; and, in the interest of the liberty of the plaintiff in error, we feel warranted in calling the attention of the court to it.

II.

The learned attorney general of the State of California, in his brief submitted upon this motion, devotes nearly the whole of it (pages 7 to 14, inclusive) to a consideration of the question whether sections 518–519 of the Penal Code of the State of California are repugnant to the Constitution of the United States (section 1, article III, and section 1, article XIV). This is not the main contention of the plaintiff in error. He contends that his conviction under those sections of the Penal Code is void because those sections are in conflict with sections 711 and 5484 of the Revised Statutes of the United States, which are as follows, viz:

SEC. 711. "The jurisdiction vested in the courts of the "United States in the cases and proceedings hereinafter 'mentioned shall be exclusive of the courts of the several "States.

"*First.* Of *all crimes* and *offenses cognizable under the* "*authority of the United States.*"

This has been the law since 1789.

The Revised Statutes of the United States prescribe in—

SEC. 5484. "Every person who shall receive any money "or other valuable thing under a threat of informing, or as "a consideration for not informing against any violation of "any internal-revenue law, shall, on conviction thereof be "punished by a fine not exceeding two thousand dollars, or "by imprisonment not exceeding one year, or both, at the "discretion of the court, with costs of prosecution."

It is quite clear that the offence charged in the indictment found against the plaintiff in error is the obtaining of thirty dollars from one Greenwald under a threat of informing against him for a violation of the revenue law of the United States. The language of the indictment is that plaintiff in error did obtain the said money by threatening to accuse said Greenwald of the crime of having, in violation of the internal-revenue laws, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein; and it is equally clear that this is an offense prescribed by the Revised Statutes of the United States, of which section 3392 is as follows:

SEC. 3392. "All cigars shall be packed in boxes not before "used for that purpose, containing, respectively, twenty-five, "fifty, one hundred, two hundred and fifty, or five hundred "cigars each; and any person who sells or offers for sale, or de- "livers or offers to deliver, any cigars in any other form than "in new boxes as above described, or who packs in any box "any cigars in excess of the number provided by law to be put "in each box respectively, or who falsely brands any box, "or affixes a stamp on any box denoting a less amount of "tax than that required by law, shall be fined for each such "offence not less than one hundred dollars nor more than

"one thousand dollars, and be imprisoned not less than six "months nor more than two years: *Provided*, That nothing "in this section shall be construed as preventing the sale of "cigars at retail by retail dealers who have paid the special "tax as such from boxes packed, stamped and branded in "the manner prescribed by law."

III.

Section 518 of the Penal Code of California, under which the plaintiff in error stands convicted, is as follows:

"Extortion is the obtaining of property from another "with his consent, induced by a wrongful use of force or "fear, or under color of official right."

Section 519 provides as follows, to wit:

"SEC. 519. Fear such as will constitute extortion may "be induced by a threat, either:

1. * * *

2. "To accuse him, or any relative of his or member of "his family of any crime."

If the United States laws failed to make the offence of extorting money "under threats of informing or as a con- "sideration for not informing against any violation of any "internal-revenue law," it would be perfectly competent for the State of California to punish such offence; but the United States having made such an extortion a crime under its revenue laws, the State of California is without jurisdiction of the offence, and it must be punished, if at all, under the United States law alone.

IV.

There are numerous crimes defined by both United States and State laws wherein the United States courts have exclusive jurisdiction, among which are:

1. Homicide charged against United States officers, committed while in the performance of their duties.

(*a.*) By internal-revenue officers.

Tennessee vs. Davis, 100 U. S., 349.

(*b.*) By a United States marshal in the protection of a justice of this court from threatened death.

Cunningham vs. Nagle, 135 U. S., 1.

People vs. Welch, 36 N. E. Rep., 328 (N. Y. court of appeals), was a case of manslaughter committed by the defendant in negligently running a tugboat, of which he had charge, upon the yacht *Amelia*, whereby one Jackson was drowned.

It was claimed that inasmuch as this was an offence under section 5344 of the Revised Statutes of the United States, the State courts had no jurisdiction; but the court of appeals decided that the jurisdiction of the State and United States courts was concurrent, *because* section 5328, which was part of the title containing section 5344, provided that "nothing "in this title shall be held to take away or impair the juris- "diction of the courts of the several States under the law "thereof."

2. Embezzlement by cashiers and other officers or employés of national banks.

Commonwealth vs. Fenton, 101 Mass., 204.

The lucid language of the court in this last case is well worth citing here:

"The act of Congress from which the national banks de-
"rive their existence and organization, makes full and ample
"provision for the crime of embezzlement by any cashier, or
"other officer of such bank.

"It makes no provision or reservation for its protection,
"and punishment by any State authority, but makes it cog-
"nizable under the authority of the United States.

"By the terms of the judiciary act (U. S. Statutes, 1789,
"sec. 511, U. S. Rev. Stat.) the courts of the United States
"are vested with the exclusive cognizance of all crimes that
"are made punishable by act of Congress, except when the
"act of Congress makes other provision."

People vs. Fonda, 62 Mich., 401.
Com. vs. Ketner, 92 Pa., 372.

In re Loney, 134 U. S., 372, Mr. Justice Gray said:

"By the statutes of the United States the courts of the
"United States have jurisdiction exclusive of the courts of
"the several States, of 'all crimes and offences cognizable
"under the laws of the United States' (Rev. Stat., sec. 711,
"ch. 1), except where otherwise provided by law."

V.

The instance given by the supreme court of California of the crime of counterfeiting the money of the United States is without point, for the reason that the statute of the United States which provides for the punishment of counterfeiting contains the following clause, viz:

"And be it further enacted that nothing in this act con-
"tained shall be construed to deprive the courts of the in-
"dividual States of jurisdiction under the laws of the
"several States over offences made punishable under this
"act."

In the case of *Fox vs. State*, 5 How., 410, this court sustained the jurisdiction of the State court (of Ohio) upon the ground that the proviso in the statute excepts the offences of counterfeiting from the clause of the act of 1789, giving exclusive jurisdiction to the United States courts of offences prescribed by the laws of the United States.

VI.

The question presented is a Federal question. It comes clearly within the definition given by this court in *Tennessee vs. Davis* (*supra*), at page 258:

"A case arises under the Constitution, not merely when
"somebody comes into court to demand something con-
"ferred upon him by the Constitution or law of the United
"States or a treaty; but whenever its correct decision as to
"the rights, privilege, claim, protection or defence of a
"party in whole or in part, depends upon the construction
"of either."

And again in *Starin vs. New York*, 115 U. S., 248, this court said:

"Where it appears that some title, right, privilege or im-
"munity on which recovery depends will be defeated by one
"construction of the Constitution or a law of the United

"States, or sustained by the opposite construction, the case "is one arising under the Constitution or laws of the United "States."

VII.

Tested by these citations, it seems perfectly clear that the courts of the State of California have no jurisdiction over the offence charged in this indictment because the offence is one punishable under the internal-revenue law of the United States, and there is no reservation to the States of any right to punish such offences to be found in those laws.

VIII.

The attorney general of California by his third point seems to concede that this court will hold that the question presented is a Federal question.

That being the case, it is not the practice of the court to decide such questions upon a motion to dismiss or affirm.

We have not been able to find that the matter in issue here has ever been decided by this court except in the general manner above indicated in the cases cited. If there had been any such decision we may be quite sure that the learned attorney general of California would have found and presented it.

IX.

We do not discuss the question to which the brief of the attorney general of California pays so much attention in his first and second points, for the reason that it follows as corollaries to our contention that, if the views we have set

forth are sound, this plaintiff in error has been and is "deprived of his liberty without due process of law, contrary to the provisions of sec. 1 of art. XIV of the Constitution of the United States."

X.

The motion to dismiss or affirm should be denied.

Respectfully submitted.

JAMES PARKER,
Attorney and of Counsel for Plaintiff in Error.

FILED
NOV 4 1901
JAMES H. McKENNEY,
Clerk

Brief of Collins for D. C. Cal.
for appt.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1901.

Filed November 4, 1901.

JOHN A. SEXTON,
Plaintiff in Error

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Reply Brief of Plaintiff in Error

IN SUPPORT OF MOTION OR APPEAL.

GEORGE D. COLLINS,
Counsel for Plaintiff in Error

Filed _____, A. D. 1901.

JAMES H. McKENNEY, Clerk.

By _____
Deputy Clerk.

18417

IN THE

Supreme Court of the United States.

October Term, A. D. 1901.

JOHN E. SEXTON,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Reply of Plaintiff in Error in re Motion to Dismiss or Affirm.

STATEMENT.

The plaintiff in error was convicted in the Superior Court of El Dorado County, State of California, of having extorted thirty dollars from one Greenwald by means of a threat to accuse said Greenwald of the crime of violating the laws of the United States in selling and delivering cigars "in a form other than in a new box not before used "for the purpose of packing cigars therein" (Record, p. 2); and that is an offense against the internal revenue (Sec. 3392, Rev. Stat. U. S.). In the Superior Court a motion was made by this plaintiff in error to quash the indictment upon the ground that the Court has no jurisdic-

tion of the offense charged; the motion was denied, he excepting (Record, pp. 3, 4). From the judgment of conviction, the defendant prosecuted his appeal to the Supreme Court of the State; he raised the point that the offense charged was exclusively within the jurisdiction of the United States; that by virtue of Sections 711 and 5484 of the Revised Statutes of the United States, exclusive cognizance of the accusation, is vested in the Federal courts. The Supreme Court of the State in affirming the judgment of the trial Court, overruled these points and held that the State courts possessed jurisdiction by virtue of Section 518 of the Penal Code of the State, which reads as follows, viz:

> "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

And in a somewhat defiant assertion, said:

> "It would be extortion as defined by the Penal Code of this State, and this Court would not be concerned as to whether or not defendant's crime was also punishable under Federal laws."

The questions presented on the writ of error, are exclusively Federal questions. In the first place, we contend that the matters set forth in the indictment are within the provisions of Section 5484 of the Revised Statutes of the United States,—when read in connection with Section 3392; that by virtue of Section 711 of the Revised Statutes, the Federal courts have exclusive jurisdiction. In the next place, we contend that the decision of the Supreme Court of the State, in effect holding that the State statute confers the jurisdiction on the State courts necessarily makes the statute *to that extent*, in conflict with Section 1 of Article 3 of the Constitution of the United States, and with Sections 711 and 5484 of the Revised Statutes. And we further contend that the State statute and the decision of the State Court operate to deprive the plaintiff in error of his liberty without due process of law; and for that reason are repugnant to the Fourteenth Amendment. The Federal questions presented arise upon the judgment roll and are certified to by the Supreme Court of the State, through the Chief Justice (Record, pp. 11, 13).

ERRORS ASSIGNED.

The following constitute the errors relied upon in support of the prayer for reversal of the judgment, viz:

I.

That the Supreme Court of the State of California, committed manifest error in deciding that Section 518 of the Penal Code of the State of California, is not in conflict with and not repugnant to the provisions of Section 1 of Article 3 and Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Sections 711 and 5484 of the Revised Statutes of the United States.

II.

That by the judgment of the Superior Court in and for the County of El Dorado, and by the judgment of the Supreme Court of the State of California, affirming said judgment of the Superior Court, the plaintiff in error is deprived of his liberty without due process of law, and is denied the equal protection of the law; all of which is in violation of the provisions of Section 1 of the Fourteenth Amendment.

ARGUMENT.

At the outset, it should be distinctly understood that our position is not at all in conflict with the well established principle of constitutional law that in the United States there is a dual sovereignty; and that the same conditions characterizing the conduct of the individual may well fix upon him the responsibility of having committed one crime against the Nation and another and separate and distinct crime against the State; thus making him amenable to each sovereignty. But there is necessarily a class of crimes that are distinctly offenses against one sovereignty and not against the other; and wherever a crime of that class appertains to the sovereignty of the United States, there the sole jurisdiction resides, and it is in the nature of things, essentially exclusive. Such must needs be the case in all instances where the crime charged is a violation of the *revenue laws* of the

United States. All matters relating to the revenue of the Nation, are of necessity within the exclusive cognizance of the general Government. Every crime, therefore, that in its nature is dependent for its existence on a revenue law of the United States, is solely an offense against the national sovereignty; nor can there be any inquiry as to whether a concurrent or subsidiary or auxiliary authority is retained by the States; for in the first place, the States never had the power to enact revenue laws extending beyond their territorial limits; and in the next place the power of the national Government to enact laws pertaining to the national revenue and to entertain prosecutions for violations of those laws, is necessarily exclusive of a concurrent or any power in the States. In the third place Congress has made the jurisdiction of the Federal courts, absolutely exclusive.

Rev. Stat., Sec. 711.

The jurisdiction of the Federal courts is just as exclusive of the State courts, in respect to crimes that depend for their existence upon the revenue laws of the United States, as is the jurisdiction of those courts in matter pertaining to the proceedings therein. It has been held that the jurisdiction over perjury committed before a notary public of the State upon a contested election of a member of the national House of Representatives, is exclusively an offense against the sovereignty of the United States.

In Re Loney, 134 U. S., 372.

In the same sense and to the same extent a crime against the revenue laws of the United States, is exclusively an offense against the sovereignty of the Nation. The revenue laws of the general Government result peculiarly from the inherent sovereignty of the Government; and the power to enact such laws and with equal scope of operation, was never possessed by any one of the several States; it is impossible, therefore to invoke the theory or doctrine of concurrent jurisdiction. The *same precise offense* of which the plaintiff in error has been convicted in the State Court, is defined by Section 5484 of the Revised Statutes of the United States, as read in its relation to Section 3392; there is no such a distinction possible as that existing between counterfeiting as an offense against the Nation and counterfeiting in its character of a

cheat, as an offense against the State. The crime of which plaintiff in error has been convicted in the State Court, is solely and exclusively a violation of the revenue laws of the United States; and cannot in the nature of things, be an offense against the sovereignty of the State. Besides there is no excuse for the intervention of the State; the law enacted by Congress (Section 5484 of the Revised Statutes), fully and completely covers the case in all its aspects. Surely it is competent for Congress to protect the individual against attempted extortion and against extortion committed by means of a threat to enforce or have enforced the revenue laws of the United States; and there is no occasion for the State to cover the same ground; there is no room for any metaphysical or other distinction, to justify State legislation, or sustain a theory of an offense against or injury to State sovereignty. But conceding that it is properly within the province of the State to protect all persons within its borders from extortion and kindred offenses; yet where Congress, acting within the scope of the authority conferred by the Constitution, has legislated upon the subject, it follows that to the extent of such legislation the power and jurisdiction of the State, if any there be, has been superseded; at least until the law of the United States has been repealed. The views expressed by Mr. Justice Story in *Houston* vs. *Moore* (5 Wheat., 65, 68, 69, 72, 73, 74, 75), fully sustain our position and require a reversal of the judgment of the Supreme Court of California. That his views correctly state the law, seems to be conceded in *Claflin* vs. *Houseman*, 93 U. S., 141, 142.

The question we present, has come before State courts of very distinguished authority and they have held that the Federal courts possess exclusive jurisdiction over the crime and that the State law is inoperative.

Com. vs. Fuller, 8 Met., 313.
Com. vs. Tenney, 97 Mass., 50.
Com. vs. Felton, 101 Mass., 204.
Com. vs. Ketner, 92 Pa. St., 372.
State vs. Tuller, 34 Conn., 280.
Com. vs. Feely, 1 Va. Cas., 321.
People vs. Fonda, 62 Mich., 407.

We have already sufficiently pointed out that the courts of the several States never had jurisdiction over the offense defined by Section

5484 of the Revised Statutes; therefore, the theory or principle of concurrent jurisdiction is inapplicable. The very explicit and positive language of Section 711 of the Revised Statutes, is conclusive against the jurisdiction of the State courts; and it is in no respect modified by Section 5328 of the Revised Statutes, in a case like this, where the State courts never had the jurisdiction; besides, Section 5328 refers only to such laws of the State, as were in existence at the time of its adoption; and does not extend to State laws subsequently passed. The law of California relative to extortion was adopted long afterwards; the case therefore is clearly within Section 711 and not Section 5328 of the Revised Statutes. It is too clear for argument that Section 5328 of the Revised Statutes has no application whatever to crimes that are exclusively offenses against the sovereignty of the United States; for instance, such as treason or as in our case, an offense against the revenue laws of the Nation.

That Section 5484 of the Revised Statutes operates to exclude State jurisdiction, see—

Prigg vs. Commonwealth, 16 Pet., 617, 618, 622.

The internal revenue law claimed to have been violated by the person against whom the extortion is alleged to have been committed is—

Section 3392, Rev. Stat. U. S.

And that provision read in connection with Section 5484 of the Revised Statutes, shows the alleged crime to be exclusively an offense against the sovereignty of the United States, and beyond the jurisdiction of the State.

For the reasons we have stated, there is nothing in the authorities cited by defendant in error that in any degree militates against our position. Take, for instance, *Cross* vs. *North Carolina* (132 U. S., 131); the Court there points out that the offense under the State law, was essentially a different offense from that defined by the Federal law; in our case the offenses are precisely the same in definition and effect. So in *Fox* vs. *Ohio*, 5 How., 410, holding that the crime of counterfeiting was an entirely different crime under the Federal law and the State law; and having differentiating characteristics; thus

making it possible for the State to take cognizance of the offense against its own sovereignty, as for a cheat; a theory inapplicable to the United States (United States vs. Cruikshank, 92 U. S., 550). But no distinction is possible between the extortion of which plaintiff in error has been convicted under the State law, and the extortion defined by Section 5484 of the Revised Statutes of the United States; they are one and the same; and the sovereignty violated, is exclusively that of the United States; which would be true in all cases where the law of the Nation and the law of the State, cover precisely the same ground, and aim at the same evil and at the same aspect of the evil. This principle is the logical result of Article 6, Section 1, of the Constitution of the United States:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

And it certainly would seem to be the law, that as the United States has exclusive jurisdiction to enforce its revenue laws and punish their violation, no legislation of the State, relating to the same subject, can be of any validity.

We desire to say in conclusion, that on a motion to dismiss or affirm, it is proper to *reverse* the judgment of the State Court, if the case on its merits calls for reversal. That was the course pursued in—

Southern Pacific Co. vs. Denton, 146 U. S., 202.

We accordingly respectfully submit that the motions to dismiss or affirm should be denied; and that the judgment of the Supreme Court of California, should be *reversed*.

GEORGE D. COLLINS,
Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1902

No. 155

IN ERROR TO THE SUPREME COURT OF CALIFORNIA

JOHN E. SEXTON, PLAINTIFF IN ERROR

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

BRIEF FOR PLAINTIFF IN ERROR

Plaintiff in error was convicted in the Superior Court of El Dorado County, State of California, of the crime of extortion upon an indictment which is as follows:

"IN THE SUPERIOR COURT OF THE COUNTY OF EL
"DORADO, STATE OF CALIFORNIA, THE 25TH DAY
"OF NOVEMBER, A. D. 1899.

"THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
"JOHN E. SEXTON and S. H. BRIGGS.

"John E. Sexton and S. H. Briggs are accused by "the grand jury of said county of El Dorado, by this

"indictment, of the crime of extortion, committed as "follows, to wit:

"The said John E. Sexton and S. H. Briggs, prior to "the finding of this indictment, on or about the 20th "day of June, A. D. 1898, at the county of El Dorado, "State of California, did willfully, unlawfully and "feloniously obtain from one C. Greenwald certain "personal propery consisting of money, the property "of said C. Greenwald, to the amount and value of "thirty dollars, with the consent of said Greenwald "induced by the wrongful use and exercise upon him "of fear by means of a threat then and there made by "the said John E. Sexton and S H. Briggs to accuse "him, the said Greenwald, of the crime of having, in "violation of the laws of the United States of America, "sold and delivered cigars in a form other than a new "box not before used for the purpose of packing cigars "therein contrary to the form, force and effect of the "statute in such case made, and provided, and against "the peace and dignity of the people of the State of "California.

"ABE DARLINGTON,
"District Attorney.

ERRORS ASSIGNED.

The following constitute the errors relied upon in support of the prayer for reversal of the judgment, viz:

I.

That the Supreme Court of the State of California,

committed manifest error in deciding that Section 518 of the Penal Code of the State of California, is not in conflict with and not repugnant to the provisions of Section 1 of Article 3, and Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Sections 711 and 5484 of the Revised Statutes of the United States.

II.

That by the judgment of the Superior Court in and for the County of El Dorado, and by the judgment of the Supreme Court of the State of California, affirming said judgment of the Superior Court, the plaintiff in error is deprived of his liberty without due process of law, and is denied the equal protection of the law; all of which is in violation of the provisions of Section 1 of the Fourteenth Amendment.

ARGUMENT.

Plaintiff in error submits three reasons wherein he alleges that he has been deprived of his liberty without due process of law and that he has been denied the equal protection of the law, in violation of the provision of the 14th amendment, by the State of California; involving

1st. The right of the general government to exercise exclusive jurisdiction over the crime of which plaintiff in error was convicted.

2nd. The right of the State to exercise police

regulations without authority derived from a statute of the State of California.

3rd. The giving by the State of extra-territorial force to a Penal Statute.

FIRST POINT.

The right of the general government to exercise exclusive jurisdiction over the crime for which plaintiff in error was convicted.

Upon both a motion and a demurrer to set aside the indictment in the trial Court, as appears by the record, it was contended by the plaintiff in error that the offense therein charged was one arising under first clause of the eighth section of the first article, of the Constitution of the United States, giving Congress the power to lay and collect taxes, and was cognizable, exclusively in the courts of the United States by virtue of Sections 711, 722, 3392, of the Revised Statutes of the United States and Section 777 of the Penal Code of California.

Section 777, Penal Code of California, is as follows:

SEC. 777. "Every person is liable to punishment, by the laws of this State, for a public offense committed by him therein, *except where it is by law cognizable exclusively in the courts of the United States.*"

"Penalties for fraud and delinquency are a part of the regulations belonging to the subject." Ex parte Siebold, 100 U. S. 371, and Congress in the exercises of constitutional power has for the protection of its

Internal Revenue enacted Section 5484 of the Revised Statutes and it is beyond the power of the State of California to impose any further conditions (Ah Cue, 101 Cal. 198.)

Nowhere in the Constitution or laws of the United States made in pursuance thereof, can it be said that authority has been conferred upon State courts to try cases arising under the Internal Revenue laws of the United States.

In the case of Tenn. *vs.* Davis, 100 U. S. 267, this Court said :

"Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts, all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them are confided to another sovereign, and to that extent the sovereignty of the State is restricted."

And concluding the opinion and in Ex Parte Siebold, 100 U. S. 398, the Court used the following language :

"The true doctrine, as we conceive, is this, that whilst the states are really soverign as to all matters which have not been granted to the jurisdiction and

control of the United States, the constitution and constitutional laws of the latter are, as we have already said, the supreme laws of the land; and, when they conflict with the laws of the states, they are of paramount authority and obligation. This is the fundamental principal on which the authority of the constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the State, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land."

"If congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given matter and in a certain form, . . . in such a case the legislation of congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. (Prigg v. Pennsylvania, 41 U. S. 617.)" And in the same case at page 622 Mr. Chief Justice Marshall is referred to as having said: "Whereever the terms in which a power is granted to congress, or the nature of the power require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been forbidden to act."

"Every addition of power to the general government involves a corresponding diminution of the govern-

mental powers of the States. It is carved out of them."

Ex parte, Commonwealth of Virginia, 100 U. S. 339.

In the cases of Ableman *vs.* Booth, 21st Howard U. S., 506, Prigg *vs.* Penn., 41st U. S. 16, 539, Collector *vs.* Day, 78 U. S., 124, Tennessee *vs.* Davis, 100 U. S., 257, Ex Parte Commonwealth of Virginia, 100 U. S., 339, Ex Parte Siebold, 100 U. S., 371, Cunningham *vs.* Neagle; 135 U. S, 1. The question of state and federal sovereignties in their respective assigned spheres have been elaborately discussed and I have been unable in a single instance to ascertain either from the prevailing or dissenting opinions that a case of this character would not have been considered one of those arising under the Constitution of the United States and the laws made in pursuance thereof, over which the courts of the United States would have had exclusive jurisdiction.

The contention of plaintiff in error is supported in Ex parte Honghton, 7th Fed. Rep. 657, and in the following State decisions:

Com. *vs.* Fuller, 8 Met., 313.
Com. *vs.* Tenney, 97 Mass., 50.
Com. *vs.* Felton, 101 Mass., 204.
Com. *vs.* Ketner, 92 Pa. St., 372.
State *vs.* Tuller, 34 Conn , 280.
Com. *vs.* Feely, 1 Va. Cas., 321.
People *us.* Fonda, 62 Mich , 407.
Ex parte Ah Cue, 101 Cal., 198.

Mr. Justice Strong defining the police power of a

state in Railroad Company *vs.* Husen, 95 U. S. 465, 470, gives the following brief thereof:

"What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations for promotion of domestic order, morals, health and safety," and Cooley, chapter 14, Sections 572 et seq. of his Constitutional Limitations says: "But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government."

SECOND POINT.

The right of the State to exercise police regulations without authority derived from the statute of the State of California.

Section 518 of the Penal Code of California by virtue of which the State of California pretends to entertain jurisdiction of the case reads as follows:

Sec. 518. "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

Section 519 of the Penal Code of California, reads as follows:

Sec. 519, Fear such as will constitute extortion may be induced by a threat, either, * * * 2nd. To accuse him or any relative of his, or member of his family, of *any crime.*

Section 15 of the Penal Code of California reads as follows:

Sec. 15. A crime or public offense, is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed upon conviction either of the following punishments:

First: Death.

Second: Imprisonment.

Third: Fine.

Fourth: Removal from office; or

Fifth: Disqualification to hold or enjoy any office of honor, trust or profit in this state.

Section 6 of the Penal Code which took effect January 1st, 1873, is as follows:

Sec. 6. No act or omission commenced after twelve o'clock noon of the day on which this code takes effect as a law is *criminal or punishable*, except as is prescribed or authorized *by this code*, or by some statute which it prescribes as continuing in force and as not effected by its provisions or by some ordinance, municipal, county or township regulation passed or adopted under such statutes and in force when this code takes effect.

The purpose of citing the foregoing sections of the Penal Code is to show that the term *any crime* as used in section 519 means just what section 6 says and therefore the crime imputed to Greenwald, must have been defined by the laws of California and to which must have been annexed one of the penalties prescribed in Section 15.

The State of Cafifornia has by the enactment of sec-

tion 6 limited the term *Any Crime* in Section 519 to those defined by its own laws.

No one pretends to say that there is in existence among the criminal laws of California a provision similar in term to Section 3392 of the Revised Statutes of the United States and an examination of the indictment discloses the fact that the crime imputed to Greenwald was the one defined by that section of the Revised Statutes of the United States.

The jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. U. S. *vs.* Bevans, 16 U. S. 3 Wheat. 336.

Plaintiff in error contends that every ingredient necessary to allege a complete criminal offense must be derived from the laws of the sovereignty seeking to enforce its police power, and that every government should contain within itself the means of its own preservation.

Admitting that the State might upon some pretended hypothesis attain jurisdiction of this class of a case, it must if at all treat it independent of any statute of the United States upon the same subject.

The Supreme Court of California in affirming the decision in this case says: "If he had threatened to have Greenwald arrested upon a charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offense would be one against the laws of the state."

There is no merit in this position at all. Section 477 of the Penal Code of California defines counterfeiting

as a crime and comes clearly within the purview of Section 6 of the Penal Code and therefore is a crime, such as is contemplated in Sub-division 2 of Section 519, Penal Code.

THIRD POINT.

The giving by the State of extra-territorial force to a Penal Statute.

It is not pretended that the State of California could punish plaintiff in error, were it not for the existence of Section 3392, Revised Statutes of the United States, which is *a Penal Statute*, and therefore its courts have given extra territorial force to a strictly *penal law*.

"Federal sovereignty, as well as the sovereignty of the States, is limited and restricted by the Constitution. Certain powers, legislative, executive and judicial, are possessed by each, independent of the other; and in the exercise of such powers all agree that they act as separately and independently of each other as if the line of division was traced by landmarks visible to the eye (Ableman *vs.* Booth, 21 How. 506, 516.)

"The general government and the States although both exist within the same territorial limit, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres, the former in its appropriate sphere is supreme, but the States within the limits of their power not granted, or, in the language of the tenth amendment, reserved, are as independent of the general government

as that government within its sphere is independent of the States."

"Collector *vs.* Day, 78 U. S., 11 Wall, 124–126."

"Laws have no force of themselves beyond the jurisdiction of the State which enacts them and can have extra territorial effect only by the comity of other States. The general rules of international comity upon this subject were well summed up before the American Revolution by Chief Justice DeGrey as reported by Sir William Blackstone: "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature and *sequuntur forum rei.* (Rafael *vs.* Verelst, 2 W. Bl. 1055, 1058.)

Crimes and offenses against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them, except by way of extradition to surrender offenders to the State whose laws have been violated, and whose peace they have broken".

Huntington *vs.* Attrill, 146 U. S. 657.
May's Crim. *vs.* Sec. 41.

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection

of its revenue, or other municipal laws and to all judgments for such penalties."

Wisconsin *vs.* Pelican Insurance Co., 127 U. S., 265.

"It is a general principle, that the penal laws of one country cannot be taken notice of in another."

Story on Conflict, Section 620.

"The courts of one State will not notice the *penal or revenue* laws of another State."

Story on Conflict, Section 625 A.

In those cases where the general government and the states have heretofore punished for the same offense, neither sovereignty administered the law of the other wholly or partially but each possessed and exercised their police power independently of the existence of the other.

The State of California as admitted by its Supreme Court has imposed upon plaintiff in error an unreasonable and harsh judgment, while if the offense alleged against him had been committed in either of the States of Massachusetts, Pennsylvania, Connecticut or Michigan, he would have gone unmolested as far as the State Courts are concerned, and had he been put on trial in the United States Courts, the maximum penalty that could have been imposed would have been but half of that inflicted by the State in this instance.

In concluding this brief I desire to invite the attention of the Court to the case of Ableman *vs.* Booth, 21st Howard 514, wherein it was anticipated an injustice of this character might arise when the Court there said that if some of the states were not called to account they would be found extending their jurisdiction to cases arising under the Internal Revenue Laws and further said: "And it would often happen that an act which was admitted to be an offense in one state would be regarded as innocent in another and indeed praiseworthy in another."

Wherefore plaintiff in error prays that the judgment of the Supreme Court of the State of California be reversed.

Respectfully submitted,

J. E. SEXTON,

Plaintiff in Error,

In Propria Persona.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 155.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error was convicted under an indictment found by the grand jury of the county of El Dorado, in the State of California, which indictment is as follows (Record, fols. 5 and 6):

"IN THE SUPERIOR COURT OF THE COUNTY OF EL DORADO,
"STATE OF CALIFORNIA, THE 25TH DAY OF NOVEMBER,
"A. D. 1899.

"THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
"JOHN E. SEXTON and S. H. BRIGGS.

"John E. Sexton and S. H. Briggs are accused by the "grand jury of said county of El Dorado, by this indict- "ment, of the crime of extortion, committed as follows, "to wit:

"The said John E. Sexton and S. H. Briggs, prior to the "finding of this indictment, on or about the 20th day of "June, A. D. 1898, at the county of El Dorado, State of Cali- "fornia, did willfully, unlawfully and feloniously obtain "from one C. Greenwald certain personal property consist- "ing of money, the property of said C. Greenwald, to the "amount and value of thirty dollars, with the consent of "said Greenwald induced by the wrongful use and exercise "upon him of fear by means of a threat then and there "made by the said John E. Sexton and S. H. Briggs to "accuse him, the said Greenwald, of the crime of having, in "violation of the laws of the United States of America, sold "and delivered cigars in a form other than a new box not "before used for the purpose of packing cigars therein con- "trary to the form force and effect of the statute in such "case made and provided, and against the peace and dig- "nity of the people of the State of California.

"ABE DARLINGTON,
"*District Attorney.*"

Endorsed: A true bill, &c. R. B. Patterson, foreman of the grand jury.

Sundry proceedings subsequent to said conviction were had, which are shown by the transcript, and, finally, the defendant was sentenced (folio 12) to be "punished by im-"prisonment in the State prison of the State of California at "Folsom, for the term of two years."

The plaintiff in error thereupon appealed to the supreme court of the State of California (folios 13, 14), by which court, after argument, the conviction was affirmed.

Plaintiff in error thereupon sued out a writ of error in this court, directed to the supreme court of the State of California, with citation thereon, and in due course the same was returned into this court and transcript filed.

The errors assigned are as follows, viz. (folios 22, 23):

1. That the supreme court of the State of California committed manifest error in said action in deciding that section five hundred and eighteen of the Penal Code of the State of California is not in conflict with and repugnant to the provisions of section 1 of article 3 and with section 1 of article 14 of the Constitution of the United States, and with section 711 and section 5484 of the Revised Statutes of the United States.

2. That defendant is, by the judgment of the superior court in and for the county of El Dorado and by the said judgment of the supreme court of the State of California, affirming said judgment of said superior court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of section 1, article 14, of the Constitution of the United States.

So much of the opinion of the supreme court of the State of California as is material to the present issue is as follows, viz:

"Defendant has been convicted of the crime of extortion, "and appeals to this court. By the indictment it was "alleged that defendant obtained thirty dollars from one "Greenwald under fear induced by threats upon the part "of defendant to accuse him (Greenwald) of the 'crime of "'having, in violation of the laws of the United States of "'America, sold and delivered cigars other than in a new box "'not before used for the purpose of packing cigars therein.' "In substance it may be said that defendant threatened to "accuse Greenwald of violating the United States revenue "laws, and under fear induced by such threats secured from "Greenwald the aforesaid sum of $30.

"It is insisted that the facts do not constitute an offense "against the laws of the State of California, but upon the "contrary constitute a crime exclusively within the juris- "diction of the Federal courts.

"We find nothing in this contention. The defendant is "charged with the crime of extortion, an offense directly "within the jurisdiction of the State courts. He is not "charged with a violation of a Federal statute, but with a "violation of a State statute. He threatens to accuse a man "with the commission of a crime. It makes no difference if "that crime be one solely triable in the Federal courts, for "defendant is not being tried for that crime.

"If he had threatened to have Greenwald arrested upon "the charge of counterfeiting the money of this country, and "was charged with the crime of extortion for that reason, "clearly his offense would be one against the laws of this "State.

"It would be extortion as defined by the penal code of "this State, and this court would not be concerned as to "whether or not defendant's crime was also punishable "under Federal laws.

* * * * * * *

"While the evidence tending to support the conviction in "this case is very weak, we are not prepared to say it is in- "sufficient. Owing to the peculiar circumstances of the "case, and the character of the evidence relied upon to "support the verdict, we think the law would have been "well satisfied with a judgment finding the defendant guilty "of a misdemeanor."

POINTS.

I.

Before proceeding to the consideration of the above alleged errors we may be permitted to call the attention of this court to the language of the supreme court of California (to be found on page 8, folio 17), which is as follows:

"Owing to the peculiar circumstances of the case, and "character of the evidence relied upon to support the "verdict, we think the law would have been well satisfied "with a judgment finding the defendant guilty of a mis- "demeanor. But that is a matter beyond review by this "court."

It thus appears that this plaintiff in error is condemned to suffer for a crime of which *the supreme court of California does not deem him guilty.*

II.

THE QUESTION PRESENTED IS A FEDERAL QUESTION.

It comes clearly within the definition given by this court in *Tennessee vs. Davis*, 100 U. S., at page 258:

"A case arises under the Constitution, not merely when "somebody comes into court to demand something conferred "upon him by the Constitution or law of the United States "or a treaty; but whenever its correct decision as to the "rights, privilege, claim, protection or defense of a party in "whole or in part, depends upon the construction of either."

And again in *Starin vs. The Mayor, &c., of New York*, 115 U. S., 248, this court said:

"Where it appears that some title, right, privilege or im- "munity on which recovery depends will be defeated by one "construction of the Constitution or a law of the United "States, or sustained by the opposite construction, the case "is one arising under the Constitution or laws of the United "States."

III.

WHERE A CRIME IS DEFINED BY THE LAWS OF THE UNITED STATES THE COURTS OF THE LATTER HAVE EXCLUSIVE JURISDICTION, EXCEPT WHERE IT IS OR MAY BE OTHERWISE PROVIDED BY LAW.

The Revised Statutes of the United States provide—

"SEC. 711. The jurisdiction vested in the courts of the "United States in the cases and proceedings hereinafter men- "tioned shall be exclusive of the courts of the several States.

"*First.* Of *all crimes* and *offenses cognizable under the au-*
"*thority of the United States.*"

This has been the law since 1789.

SEC. 629 (Twentieth):

"The circuit courts of the United States shall have exclu-
"sive cognizance of all crimes and offenses cognizable under
"the authority of the United States, *except where it is or may*
"*be otherwise provided by law.*"

(*U. S. Revised Statutes.*)

"SEC. 5484. Every person
"who shall receive any
"money or other valuable
"thing under a threat of in-
"forming, or as a considera-
"tion for not informing
"against any violation of any
"internal-revenue law, shall,
"on conviction thereof be
"punished by a fine not ex-
"ceeding two thousand dol-
"lars, or by imprisonment
"not exceeding one year, or
"both, at the discretion of the
"court, with costs of prosecu-
"tion."

(*Penal Statutes of California.*)

"SEC. 518. Extortion is the
"obtaining of property from
"another with his consent,
"induced by a wrongful use
"of force or fear, or under
"color of official right."

"SEC. 519. Fear such as
"will constitute extortion
"may be induced by a threat,
"either:

"1. * * *

"2. To accuse him, or any
"relative of his or member of
"his family of any crime."

(We have, for convenience of reference, printed in parallel columns section 5484 and sections 518, 519 of the Penal Code of California, under which the plaintiff in error stands convicted and sentenced.)

IV.

THE OFFENSE CHARGED BY THE INDICTMENT IS THE SAME OFFENSE SPECIFIED IN SECTION 5484 OF THE REVISED STATUTES OF THE UNITED STATES, AND IS PART OF THE INTERNAL-REVENUE LAWS.

The section of the Revised Statutes of the United States which defines this crime against the United States is:

"SEC. 3392. All cigars shall be packed in boxes not before "used for that purpose, containing, respectively, twenty-five, "fifty, one hundred, two hundred and fifty, or five hundred "cigars each, and any person who sells or offers for sale, or "delivers or offers to deliver, *any cigars in any other form* "*than in new boxes as above described*, or who packs in any "box any cigars in excess of the number provided by law to "be put in each box respectively, or who falsely brands any "box, or affixes a stamp on any box denoting a less amount "of tax than that required by law, shall be fined for each "such offense not less than one hundred dollars nor more "than one thousand dollars, and be imprisoned not less than "six months nor more than two years: *Provided*, That noth- "ing in this section shall be construed as preventing the "sale of cigars at retail by retail dealers who have paid the "special tax as such from boxes packed, stamped and "branded in the manner prescribed by law."

The language of the indictment is that:

"The said John E. Sexton and S. H. Briggs, &c., did will- "fully, unlawfully and feloniously obtain from one C. "Greenwald certain, &c., money, to the amount and value

"of thirty dollars, by *means of a threat then and there made by "the said John E. Sexton and S. H. Briggs to accuse him the "said Greenwald, of the crime of having, in violation of the "laws of the United States of America, sold and delivered cigars "in a form other than a new box not before used* for the pur- "pose of packing cigars therein."

The crime is charged almost in the exact language of sections 5484 and 3392 of the Revised Statutes of the United States.

The language of section 5484 is that—

"Every person who shall receive any money, &c., under "a threat of informing or as a consideration for not inform- "ing against any violation of any internal-revenue law, "shall," &c.

By section 3392 of the Revised Statutes it is made a crime to "sell, &c., any cigars in any other form than in new boxes," &c.

The charge of the indictment is that the plaintiff in error secured from Greenwald thirty dollars by means of a threat to accuse said Greenwald of having sold and delivered cigars "*in a form other than a new box not before used for the "purpose of packing cigars therein.*" The part quoted and italicized is the exact language of section 3392.

V.

THERE ARE MANY CRIMES DEFINED BY BOTH UNITED STATES AND STATE LAWS WHEREIN JURISDICTION OF THE PARTICULAR OFFENSE IS EXCLUSIVE IN THE COURTS OF THE UNITED STATES.

1. Homicide is an offense unquestionably cognizable under State laws; but where committed by United States officers while engaged in the performance of their duties as such officers, exclusive jurisdiction is in the United States courts. Such was the case of *Tennessee vs. Davis* (*supra*), wherein an officer engaged in performing his duty as such found it necessary to return the fire of sundry persons engaged in illicit distilling—an offense against the internal-revenue laws—the result of which was the death of one of such illicit distillers.

2. CUNNINGHAM *vs.* NEAGLE, 135 U. S., 1, was a killing by an United States marshal in the protection of a justice of this court. The case is too well known to this court to need more than a reference to it.

Embezzlement is another case clearly cognizable under State laws, but when the offense is committed by an officer or employee of a national bank the State has no jurisdiction of the offense.

Section 5209 of the Revised Statutes of the United States (part of the national banking act) provides for the punishment of six different offenses, all of which are offenses that may be committed against State laws, but none of which

Commonwealth vs. Feeley, 1 Va. Cases, 321 (Nov., 1813):

The court (Judges White, Stuart, Brockenbrough, Semple, Allen, Randolph, Dabney, and Daniel) in that case (an indictment for robbing the mail) "doth unanimously decide "that, as the offense described in the indictment in this case "is created by an act of Congress, the State court hath not "jurisdiction thereof."

Commonwealth vs. Fuller, 8 Met. (Mass.), 313 (1844):

This was an indictment for having in possession counterfeit coin with intent to utter and pass the same.

The COURT: The United States statute of April 21, 1806, provides "that nothing in this act contained shall be con-"strued to deprive the courts of the individual States of "jurisdiction under the laws of the several States over "offenses made punishable by this act," and the act of March 3, 1825, contained the same proviso.

"By the act of 1789, exclusive jurisdiction is not conferred "on the United States courts where the laws of the United "States shall otherwise direct."

"The above-mentioned statutes of 1806 and 1825 give "such other direction."

For this reason only the jurisdiction was sustained.

People vs. Fonda, 62 Mich., 401:

The COURT: "The question raised in this case is: The "Federal Government having declared the act charged "against this respondent a criminal offense, and provided "for the apprehension, trial and conviction under its laws, "had the State any jurisdiction, concurrent or otherwise, to

"deal with respondent, making the same act criminal, and "providing for its punishment?"

After citing the language of U. S. Rev. Stat., sec. 5209, the court proceeds: "The examination of this statute must "convince any one that the offense described in this (the "State) information, is very clearly described therein, and "fully within the scope of the act (of Congress) and the ju- "risdiction of the Federal courts."

"Congress by law enacted the national banking system, "and prescribed a punishment for the offense charged "against the respondent. It seems to me, clearly, the case "is one falling within the paragraph of sec. 711 (U. S.); and "that, by the Federal law, the jurisdiction of the State is "expressly excluded."

are cognizable under such laws when committed in regard to national banking associations.

In the case of *Commonwealth vs. Fenton*, 101 Mass., 204, the supreme court of that State, in reversing a conviction in the court below, said, in language plainly applicable here:

"The act of Congress from which the national banks derive "their existence and organization, makes full and ample "provision for the crime of embezzlement by any cashier, or "other officer of such bank.

"It makes no provision or reservation for its protection, "and punishment by any State authority, but makes it cog- "nizable under the authority of the United States.

"By the terms of the judiciary act (U. S. Stat., 1789; "sec. 511, U. S. Rev. Stat.) the courts of the United States "are vested with the exclusive cognizance of all crimes that "are made punishable by act of Congress, except when the "act of Congress makes other provision."

People vs. Fonda, 62 Mich., 401.

Com. vs. Ketner, 92 Pa., 372.

PERJURY.

Thomas vs. Loney, 38 Fed. Rep., 101, was a case in which Loney was charged before a State tribunal with having committed perjury in having testified falsely before a notary public in a proceeding regulating a contest for a seat in the House of Representatives of the United States.

Hughes, J., said:

"In general, and indeed in the great majority of cases, "perjury is an offense against the State, cognizable exclu- "sively by the State courts. But when committed by per-

"sons designated by penal laws of Congress, in proceedings "prescribed and regulated by acts of Congress, it is an "offense against the United States, and is exclusively cog- "nizable by the national courts."

In this court, on appeal, Mr. Justice Gray (134 U. S., 372) said:

"By the statutes of the United States the courts of the "United States have jurisdiction exclusive of the courts of "the several States, of 'all crimes and offenses cognizable "under the laws of the United States' (Rev. Stat., sec. 711, "cl. 1); and the circuit courts of the United States have ex- "clusive cognizance of all such crimes and offenses except "where otherwise provided by law.

"Congress has regulated by law the form in which notice "of a contested election may be given and answered, and "the time and manner in which depositions on oath of "witnesses in such cases may be taken before * * * a "notary public or any officer authorized to take depositions "by the laws of the State, or of the United States.

"Any one of the officers designated by Congress (such as "a notary public) performs this function, not under any "authority derived from the State, but solely under the "authority conferred by Congress, and perjury in giving "such testimony is punishable in the courts of the United "States.

"The administration of justice in the national tribunals "would be greatly embarrassed, and impeded, if a witness "testifying before a court of the United States, or upon a "contested election of a member of Congress, were liable to "prosecution and punishment in the courts of a State upon

"a charge of perjury, preferred by a disappointed suitor or "contestant.

"A witness who gives his testimony, pursuant to the Con- "stitution and laws of the United States, &c., is accountable "for the truth of his testimony to the United States only, "and perjury committed in so testifying is an offense against "the public justice of the United States and within the ex- "clusive jurisdiction of the courts of the United States, and "cannot, therefore, be punished in the courts of the State."

The instance given by the supreme court of California of the crime of counterfeiting the money of the United States is without point.

Counterfeiting was a crime under the laws of the several States before the adoption of the Constitution, and when the Congress adopted the act of March 3, 1825, that act contained a clause as follows: .

"And be it further enacted that nothing in this act con- "tained shall be construed to deprive the courts of the indi- "vidual States of jurisdiction under the laws of the several "States over offenses made punishable under this act."

Whatever might have been formerly said or held upon the question of counterfeiting has no bearing whatever upon the question before us at the present.

Chapter 24 of the act of January 16, 1877, has been amended so as to read as follows:

"Every person who falsely makes, forges, or counterfeits, "&c., any coin or bars in resemblance or similitude of the "gold and silver coins or bars * * * of the United

"States, * * * or who passes, utters, publishes, or sells, "&c., or has in his possession, &c., with intent to defraud "shall be punished, &c."

From this act the clause contained in the act of 1825 (above cited), reserving to the States the right to punish counterfeiting or passing counterfeit coin of the United States, has been omitted, and since that omission those offenses have not been cognizable by the courts of the States, and no prosecution under State laws has been attempted.

VI.

THE STATES HAVE NOTHING WHATEVER TO DO WITH THE INTERNAL-REVENUE LAWS OR THE CUSTOMS LAWS. IT WILL NOT BE PRETENDED THAT THEY HAVE ANY COGNIZANCE OF THE CRIMES ARISING UNDER THOSE LAWS.

The offense for which the plaintiff in error has been convicted and sentenced by the courts of the State of California is an offense against the internal-revenue laws of the United States and is punishable under those laws, and there is no reservation—as, from the nature of the case, there could not be—to the States of any jurisdiction in relation to such offenses.

If the United States laws failed to make the offense of extorting money "under threats of informing or as a con- "sideration for not informing against any violation of any "internal-revenue law," it would be perfectly competent for the State of California to punish such offense; but the United States having made such an extortion a crime under its

revenue laws, the State of California is without jurisdiction of the offense, and it must be punished, if at all, under the United States law alone.

VII.

TESTED BY THE FOREGOING CITATIONS, IT SEEMS PERFECTLY CLEAR THAT THE COURTS OF THE STATE OF CALIFORNIA HAVE NO JURISDICTION OVER THE OFFENSE CHARGED IN THIS INDICTMENT AGAINST THE PLAINTIFF IN ERROR.

VIII.

We do not feel it necessary to discuss the second assignment of error for the reason that if our contention be sound, that the plaintiff in error has been tried, convicted, and sentenced by the courts of the State of California for an offense over which those courts have no jurisdiction, it follows as a corollary that he has been and is "deprived "of his liberty without due process of law, and is denied the "equal protection of the law, contrary to the provisions of "section 1, art. XIV, of the Constitution of the United "States."

IX.

The judgment of the supreme court of California should be reversed, with costs to the plaintiff in error.

JAMES PARKER,

Attorney and of Counsel for the Plaintiff in Error.

FILE COPY.

Supreme Court of the United States.

October Term, 1902.

Office Supreme Court U. S.
FILED
FEB 25 1903
JAMES H. McKENNEY,
Clerk.

No. 155.

JOHN E. SEXTON,

PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

REPLY BRIEF

FOR PLAINTIFF IN ERROR.

JOHN E. SEXTON,
In Propria Persona.

Supreme Court of the United States.

October Term, 1902.

JOHN E. SEXTON,

PLAINTIFF IN ERROR,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

This cause was called in the Court on the 28th day of January, A. D., 1903, and argued for Plaintiff in Error. There being no one present to argue said cause for Defendant in Error it was ordered that twenty days be allowed said Defendant in Error in which to file a brief, and that plaintiff have five days in which to reply thereto.

Argument.

I.

Defendant in Error has devoted the larger part of their brief to a discussion and presentation of law involving

the exercise of police power, over different subjects by the States.

To this we answer by saying that the State has a right through its Legislative bodies to enact laws, make all needful regulations for the promotion of domestic order, morals, health and safety, with one exception, and that is that it must not invade the domain of the National Government.

It, however, must be understood that the law or regulation referred to must be traced to the legislation of the sovereignty seeking to enforce it, and so far as the exercise of that power is concerned in relation to criminal procedure it cannot be extending by implication or enlarged by presumption.

We admit that the Constitution of the United States is a part of the organic law of every state, but acts of Congress enacted upon subjects expressly delegated to that body are not. Laws enacted by Congress are for the government and protection of another sovereignty.

The Defendant in Error offers no reason for the giving of extra-territorial effect to a strictly penal law of the United States.

It affirmatively appears from the face of the indictment in this case that the *basis of this cause of action* arises under a penal statute of the United States, to-wit: Section 3392, of the Revised Statutes of the United States.

Penal laws have no force of themselves beyond the

sovereignty that enacts them.

Wisconsin vs. Pelican Insurance Co., 127 U.S.265.
Huntington vs. Attrill, 146 U. S. 657.
Story on Conflict of Laws, Chapter XVI.

II.

It is contended, at page 13 of their brief, that the case of The People vs. Welch, 141, N. Y. 266, expresses the views of Defendant in Error in this case.

In that case the crime of which Welch was convicted was, I should assume from the language of the decision, defined by a statute of the State of New York, enacted prior to the enactment of Section 5328 of the Revised Statutes of the United States, while Section 518 of the Penal Code of California was passed long afterwards; and I quote from that decision the following:

"It is an accepted canon in the construction of powers "granted to the general government by the federal con- "stitution that state authority existing when the con- "stitution was adopted is not excluded by the mere grant "of similar powers to Congress."

III.

At page 13 of this brief Defendant in Error says:

"Second—But, we do not concede that the offense defined "by the California statute and the offense defined by the "Federal statute are one and the same offense."

At page 15 of their motion to dismiss or affirm this decision in this Court, Defendant in Error said:

"It is true that one of the provisions of subdivision 2 of "Section 519 contemplates the same offense contemplated "by Section 5484 of the Revised Statutes of the United "States, and that is all there is of Plaintiff's case."

There is no side of this question left for Plaintiff in Error to discuss, as Defendant has taken them both.

Allegans contraria non est audiendus.

IV.

To the second point of Defendant in Error. (Page 13 of brief.)

I submit that the language used in the indictment imputing a crime to Greenwald is purely a matter of pleading, as appears by the instructions of the trial Judge (folio 175, Transcript of Appeal to the Supreme Court of California) which is as follows:

"Now in order that the defendents should have been "guilty of making the threat above-mentioned, it is not "necessary that they should have employed the language "used in the indictment describing the crime, or is it nec- "essary that they should have named the crime in making "the threat and embodied in the threat all the particulars "and details which are contained in the legal definition "of the crime."

The evidence discloses the fact that neither the word

accuse or *inform* were used.

V.

At page 14 of the brief a reference is made to the case of The People vs. Sexton and The People vs. Hoffman, relating to the sufficiency of the indictment.

If the Indictment in this case was measured by the decision in the case of Hoffman it is defective, inasmuch as an indictment against Greenwald in the United States Court would not have been good unless it contained in addition to the pleading already quoted from Section 3392, Revised Statutes of the United States, the following words: ***with intent then and therein to defraud the United States of America.***

There could be no crime imputed to Greenwald unless it was alleged that he was charged with a violation of Section 3392, ***with intent to defraud the United States of America.***

Respectfully submitted,

JOHN E. SEXTON,
Plaintiff in Error.
In Propria Persona.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. [illegible]

JOHN H. SEXTON, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON APPEAL TO REVIEW FOR DEFENDANT IN ERROR.

[illegible]

Attorneys and Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 155.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO BRIEF FOR DEFENDANTS IN ERROR.

The learned attorney general of the State of California, in the first statement of his brief, says:

"We shall argue that this court has no jurisdiction over "the questions or the subject-matter presented by the writ "of error herein, for that no Federal question properly "arises therein."

To which we reply that that question was submitted to this court on the motion to dismiss or affirm, and we feel sure that if this court had not thought it a Federal question it would promptly have granted that motion. In our brief

we have cited from two decisions of this court on that subject, and beg now to refer, in addition, to the case of *Houston vs. Moore*, 5 Wheat. (18 U. S.), 1, which was one very much like the one at bar. There the plaintiff in error (a member of the militia of the State of Pennsylvania) had been tried by court-martial under the law of that State and punished (by sentence to pay a fine). He brought that case into this court by writ of error, claiming, as we do, that the law of the State of Pennsylvania was in conflict with the Constitution and laws of the United States.

The court had no doubt that a Federal question was thereby presented, and heard and decided the case on its merits.

This case will be referred to later on.

First Point.

It is not proposed to waste time over the learned attorney general's FIRST POINT, which he so elaborately discusses (pp. 1–8, inclusive) in his brief.

As I read it, the comment of Prince Hal upon Falstaff's bill came into my mind.

It may freely be admitted that *if* the courts of the State of California had jurisdiction over the offense, for the alleged commission of which the plaintiff in error has been indicted, tried, convicted, and sentenced, then he has *not* been "deprived of his liberty by due process of law, contrary to "the provisions of sec. 1, art. XIV, of the Constitution of the "United States;" but, on the other hand, if the plaintiff in error *has* been tried, convicted, and sentenced by the courts of the State of California for an offense over which they had no jurisdiction, because such offense is one defined by the

laws of the United States, and over which the courts of the United States have *exclusive* jurisdiction (as plaintiff in error claims), then, as stated in our brief, "it follows as a corollary "that he HAS been deprived of his liberty without due pro- "cess of law, contrary to the provisions of sec. 1, art. XIV, "of the Constitution of the United States."

Second Point.

The learned attorney general's discussion of his second point (pages 9–12 down to the word "first" on page 12) of the police powers of the States and United States has no bearing whatever upon the sole question at issue in the case at bar.

It is undoubtedly true that there are many cases wherein the United States and the States have concurrent jurisdiction of the same offenses.

In citing from Mr. Justice Harlan's opinion, given in *Cross vs. The State of North Carolina* (132 U. S., 131), the attorney general should have gone a few lines further on and have added: "If it were competent for Congress to give exclusive "jurisdiction to the courts of the United States, &c., *it has* "*not done so. The false making* or forging of a promissory "note in a State purporting to be executed by an individual, "and made payable at a national bank, *is not a fraud upon the* "*United States, or an offense described in Rev'd Stat., § 5418.*"

Cross had been indicted and convicted for forging such a note.

The learned attorney general refers in terms of high commendation to the case, decided by the court of appeals of New York, of

People vs. Welch, 141 N. Y., 266.

That case maintains the sound propositions that "as to "crimes committed upon navigable waters within the State, "if they are such as existed at common law, and are defined "in the statutes of the State, while the Congress may exclude "the jurisdiction of the State courts, in the absence of such "exclusion that jurisdiction remains, although Congress "has vested jurisdiction over them in the Federal courts.

"No presumption that State authority is excluded arises "from the mere fact that Congress has legislated; there "must be express words of exclusion, or a manifest repug- "nancy in the exercise of State authority over the subject."

It cannot be pretended that the crimes under the internal revenue laws of the United States were "*crimes* at common law," or can be, and are or can be defined by the law of the State, or that the State had any jurisdiction over them at the time the Constitution was formed or *since;* and it is equally true that in cases where the United States has legislated over that subject, there is a "manifest repugnancy in "the exercise of State authority" over the same subject.

The attorney general in his brief "confesses and avoids" (or endeavors to avoid) our contention. He says that he does "not concede that the offense defined by the California "statute and the offense defined by the Federal statute are "one and the same offense, and that sec. 711 of the Revised "Statutes does not give the Federal courts exclusive juris- "diction, because § 5328 provides an exception to the opera- "tion of § 711." But does it? we ask.

Certainly if it does, then the States have jurisdiction to try and punish every offense denounced by title 70 of the Revised Statutes, from treason down.

That proves too much, and such a position cannot be maintained.

The case of *Houston vs. Moore* (in which the attorney general erroneously says Mr. Justice Story delivered the opinion of the court) is not in conflict with our contention here.

Mr. Justice Washington, in delivering the opinion of the majority of the court, there said: "As to State militia, the "power of the State governments to legislate on the subject "having existed prior to the formation of the Constitution, "and not having been prohibited by that instrument, it re- "mains with the States, *subordinate nevertheless to the para- "mount law of the General Government operating on the same "subject.*"

What the attorney general says (on pages 12, 13) about "charging," "accusing," and "informing" seems a mere play upon words.

A good pleader, in drawing an indictment, would, without doubt, use the words of the statute; but there can be little doubt that the statute would be satisfied if it were shown that a threat either to "accuse," "charge," or "inform" had been made.

In *U. S. vs. Simons*, 7 Fed. R., 709, Mr. Justice Brown (then district judge) merely decided between two or more persons as to which *was* the informer in that case.

Respectfully submitted.

JAMES PARKER,

Attorney and of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 155.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

And now comes the plaintiff in error in the above-entitled cause, and respectfully petitions this honorable court to allow him a rehearing in said cause upon the following grounds, viz:

I.

The court in its opinion, filed April 6, 1903, says (page 1): "The record now before us raises but a single question for "our consideration, and that is whether the State court upon "the facts alleged in the indictment had any jurisdiction "over the subject-matter."

"The plaintiff in error contends that the right of the "General Government to exercise jurisdiction over the "crime of which he is convicted is exclusive, and, there-

" fore, the State court had no right to try him upon the " indictment found in that court."

" The act (crime) of which the plaintiff in error is alleged " to have threatened to accuse Greenwald of committing is " mentioned in section 3392 of the Revised Statutes of the " United States, which makes it an offense to sell cigars " unless in new boxes, with the exception therein detailed."

II.

Section 3392 of the Revised Statutes of the United States is part of the " internal-revenue laws," and, after declaring that " all cigars shall be packed in boxes not before used for " that purpose, containing respectively twenty-five, fifty, one " hundred, two hundred and fifty, or five hundred cigars " each," it defines four acts as offenses, the commission of which shall subject the offender to fine for such offense of " not less than one hundred nor more than one thousand " dollars, and imprisonment not less than six months nor " more than two years."

1. Offering for sale, or delivering or offering to deliver " any cigars in any other form than in new boxes as above " described: or

2. " Who packs in any box any cigars in excess of the " number provided by law to be put in each box respect- " ively; or

3. " Who falsely brands any box; or

4. " Or affixes a stamp on any box denoting a less amount " of tax than that required by law."

III.

Another section of the Revised Statutes of the United States is as follows:

SEC. 5484. " Every person who shall receive any money " or other valuable thing under a threat of informing, or as

"a consideration for not informing against any violation of "any internal-revenue law, shall, on conviction thereof, be "punished by a fine not exceeding two thousand dollars, or "by imprisonment not exceeding *one* year, or both, at the "discretion of the court, with costs of prosecution."

IV.

The law of the State of California under which the plaintiff in error was tried and convicted is found in the following sections of the Penal Code of that State, viz:

"SEC. 518. Extortion is the obtaining of property from "another, with his consent, induced by a wrongful use of "force or fear, or *under color of official right.*

"SEC. 519. Fear such as will constitute extortion may be "induced by a threat either:

"1. * * *

"2. To accuse him or relative of his, or member of his "family, of any crime."

V.

The reasoning of the supreme court of California, in that part of its opinion cited by this court, is entirely fallacious.

That court says: "It makes no difference if that crime be "one solely triable in the Federal courts, for defendant *is not* "being *tried* for that crime."

This begs the question, because it is undeniable, as a comparison of the indictment with section 5484 will show, that the defendant *was* being tried for a crime defined and punishable under that section for "receiving money from Greenwald "*under a* threat of informing against him for having in vio- "lation of the laws of the United States of America, *sold and* "*delivered cigars in a form other than a new box not before used* "*for the purpose of packing cigars therein.*"

What I have underscored is the exact language of section 3392 of the Revised Statutes of the United States.

The case of "counterfeiting the *money* of the United States is mentioned by this court; and *Fox vs. Ohio*, 5 How., 410, is cited.

The words "*coin* of the United States" would confine this illustration to its exact limitation. The offense of which Malinda Fox had been convicted was that—*not* of counterfeiting—but of "*passing and uttering* a certain piece of false, "base, and counterfeit coin, forged and counterfeited to the "likeness and similitude of the good and legal silver *coin* "currently passing in the State of Ohio called a dollar."

Mr. Justice Daniel, in delivering the opinion, stated the issue thus (p. 432): "The only question with which it (this "court) can regularly deal in this case is the following, viz: "Whether that portion of the statute of Ohio, under which "the prosecution against the plaintiff has taken place, and "consequently whether the conviction and sentence founded "on the statute are inconsistent with or in contravention "with the Constitution of the United States or of any law of "the United States enacted in pursuance of the Constitu-"tion."

"We think (p. 433) it manifest that the language of the "Constitution, by its proper signification, is limited to the "facts, or the faculty in Congress of *coining and stamping* "the standard of value upon what the Government creates "or shall adopt, and of punishing the offense of producing a "false representation of what may have been so created or "adopted."

Thus *Fox vs. Ohio* decides, as stated in the *syllabus*, that "the power conferred upon Congress to provide for the "punishment of *counterfeiting* the securities and current coin "of the United States does not prevent a State from pass-"ing a law to punish the offense of *circulating counterfeit* "*coin*. The two offenses of counterfeiting the coin and

"passing counterfeit money are essentially different in their "characters."

The Congress at that time had passed no act to punish the uttering or circulating of counterfeit coin.

The principle decided in *Fox vs. Ohio* plainly has no application or bearing in the present case. If *Malinda Fox* had been indicted under the State law for *counterfeiting* the coin of the United States, the question then—that being a crime against the law of the United States—would have been as to the right of concurrent jurisdiction on the part of the State. The jurisdiction of the State would then have been saved by the twenty-sixth section of the act of Congress relating to counterfeiting offenses, which was in these words: "That nothing in this act contained shall be construed to "deprive the courts of the individual States of jurisdiction, "under the laws of the several States, over offenses made "punishable by this act."

But, as stated in my brief heretofore filed, *Fox vs. Ohio* has been reduced to a condition of "innocuous desuetude" by the repeal of all provisions of law saving to the States any jurisdiction over counterfeiting offenses, and the fact that since the passage of the act of January 16, 1877 (19 Stat. at L., 223) no offense of counterfeiting *or* passing counterfeit coin or national bank or United States notes has been cognizable under the laws of the States, and no such prosecutions have been had under State laws.

VI.

This court in its opinion in the present case says:

"It is true that the offense of extortion by threats to "accuse a person of a violation of any part of the internal-"revenue law, is made a crime by virtue of the Federal "statute. *If there were no statute in regard to the sale of cigars "other than in new boxes*, as provided for in section 3392 of "the Revised Statutes, a threat to accuse a person of doing

"such an act *would not be a threat to accuse him of any crime*, "and hence would not be punishable. As the crime *itself* "*exists only by virtue of the above section*, and as the threat to "accuse one of the commission of such an act is also pro- "vided for by another section, there might be some plausibil- "ity in the contention of the plaintiff in error that, under "the Federal statutes above cited, jurisdiction of the United "States courts was exclusive.

"We do not decide that such contention is well or ill "founded; nor do we express an opinion thereon, because "we do not regard it as necessary for our decision in this "case.

"The section which makes it an offense to extort money "under a threat of informing in regard to an alleged viola- "tion of any internal-revenue law (sec. 5484) is contained in "title 70, denominated 'Crimes' in the United States Re- "vised Statutes, and, in that title, is found another section "which provides that—

"SEC. 5328. 'Nothing in this title shall be held to take "away or impair the jurisdiction of the courts of the several "States under the laws thereof.'

"Assuming that, but for this section, the State court would "be without jurisdiction, we are of the opinion that it takes "the case out of the provisions of sec. 629, sub. 20, and sec. "711.

"Section 5328 must be construed as creating an exception "to the general rule declared in these other sections in re- "gard to the jurisdiction of the Federal courts."

The court then cites the case of *People vs. Welch* (141 N. Y., 266–277), and justly styles the opinion in that case as "very well reasoned."

We accept this characterization of that case in its fullest sense, but we very humbly doubt the correctness of the other statement that the court of appeals of New York placed the same construction upon section 5328 now given by this court.

We do this with extremely reluctant diffidence, in view of the fact that the learned justice who delivered the opinion of this court in the present case was a member of the court of appeals of New York when *People vs. Welch* was unanimously decided.

The languge of section 5328 of the Revised Statutes of the United States is, "Nothing in this title, 70, shall be held to "*take away or impair* the jurisdiction of the courts of the "several States," &c.

Of course, that means any jurisdiction such State courts had *at the time that section was enacted.* Of course, also, it cannot rightfully be construed to give authority to the States to assume jurisdiction over offenses against laws that might *thereafter* be enacted by the United States. These propositions are sustained in *People vs. Welch. Welch's* offense was manslaughter, committed by him by having "feloniously and willfully propelled and forced a steam tugboat against a yacht and thereby causing the death of one Jackson by drowning."

This had also been declared by Congress to be an offense against the laws of the United States.

Chief Justice Andrews, while conceding the jurisdiction of the United States to punish such an act, committed even *infra corpus comitatus*, maintained the jurisdiction of the State by the following argument, viz.:

"The State, in punishing the defendant, is not enforcing "a statute of the United States. It is enforcing its own laws, "*which had an existence coeval with the formation of the State* "*constitution.* The crime of which the defendant was con- "victed was primarily a crime against the peace and good "order of the *State.* It was only a crime against the United "States because Congress, in the interest of navigation, had "seen fit to enact a law making one species of homicide "when committed by an officer, pilot, etc., manslaughter, "punishable in the courts of the United States."

"There is nothing in the enactment itself which makes "the jurisdiction exclusive. The jurisdiction of the United "States courts is *not exclusive* unless there is found elsewhere "in the provisions of Congress provisions of clear and un- "mistakable import *taking away* the jurisdiction of the courts "of the State."

We think section 5328 must be construed as exempting from the "operation of section 711 the cases specified in "title 70, which *were also offenses punishable under* the laws "of the United States."

"Section 5328 may perhaps be construed as confining the "concurrent jurisdiction of the State courts of offenses "specified in title 70 to such offenses as were such *under the* "*laws of the States existing when that section was enacted*, leav- "ing the section (711) to operate to prevent future legisla- "tion by the States concerning the crimes mentioned in "that title not before cognizable under State laws."

VII.

To apply these sound principles thus declared by the court of appeals of New York in the present case, we may state:

1. That section 5328 was adopted originally in 1795. The section 5484, of title 70, was adopted July 13, 1866. Can it with any propriety be said that section 5328 applies (without special enactment to that effect) to an offense against the internal-revenue laws (which laws were not even in contemplation, much less in existence, at that time and for more than seventy years thereafter), and which was passed by Congress to secure protection of its internal-revenue system, and concerning which the States never had and have not now any cognizance whatever?

VIII.

By section 3169 of the Revised Statutes of the United States it is provided that "any officer or agent appointed and acting under the authority of any revenue law of the United States—

"*First.* Who is guilty of any extortion or willful oppression "*under color of law*, or

"*Tenth.* Who demands or accepts, &c., for the compromise "or settlement for any violation or alleged violation of law, "&c., shall be held to be guilty of a misdemeanor, and fined, "&c., and imprisoned."

The doing of all this would undoubtedly fall under the ban of this California law, which declares that "extortion is "the obtaining of property from another * * * *under* "*color of official right.*"

Does this court intend by its decision to hold, as there can be no doubt it would hold, that an *officer* who obtains property from another "wrongfully by *color* of *official right*" is *not* amenable to the law of California, but that a person not an officer *is* amenable under the same law for doing the same thing, simply because the offense of the latter is denounced by a section which is part of title 70, which title contains section 5328, while the former is not?

IX.

This court certainly cannot intend to commit itself to any such inconsistency.

"It is said that hard cases make bad law."

The consideration that, if this decision of the courts of California is reversed by this court, the plaintiff in error will escape punishment for the offense of which he was con-

victed may not be without weight, but, on the other hand, it is to be remembered that the supreme court of California said, in its opinion, that "the evidence tending to support "the conviction in this case is very weak," and that owing to the peculiar "circumstances of this case and the character "of the evidence relied upon to support the verdict, we think "the *law would* have been well satisfied with a judgment "finding the defendant guilty of a misdemeanor."

It is of vastly greater importance that the exclusive jurisdiction of the United States over crimes denounced by its own laws should be maintained against invasions by the States than that a doubtful jurisdiction of the State should be maintained in this case.

It will place the citizen in a hard plight if, in cases wherein the United States authorities fail for any reason to regard a certain transaction as a violation of its laws, the State should be allowed to take the matter up and by the use of local or other considerations convict and punish more heavily than the United States law permits. (The California law permits *two* years imprisonment, the United States law only *one* year.)

If this decision by this court is to stand there will be nothing to prevent a man who has been punished under the law of the United States from being brought up (and punished more severely) under the law of the State for the same offense, and *vice versa*, which would, of course, be intolerable.

The framers of the Constitution foresaw this and provided against it by that clause which says:

"This Constitution and the laws * * * made in pur-"suance thereof shall be the supreme law of the land, * * * "anything in the Constitution or laws of any State to the con-"trary notwithstanding."

And Congress, by its enactments in 1795, in sections 629 and 711, while also careful to preserve the jurisdiction of the States, *which they had before such laws* were adopted, has been

careful to maintain this necessary attribute of supreme sovereignty.

The condition of affairs to which the decision of this court in the present case would lead us was well set forth in this court in the case of *Ableman vs. Booth* (21 How., 506, L. ed., vol. 16, p. 169), where the Chief Justice, in delivering the unanimous opinion of the court, said:

"If the supreme court of Wisconsin possessed the power "it has exercised in relation to the act of Congress in ques- "tion, it necessarily follows that they must have the same "judicial authority in relation to any other law of the United "States; and, consequently their supervising and controlling "power, would embrace the whole criminal code of the "United States, and *extend to offenses against our revenue laws*, "or any other law intended to guard the General Govern- "ment from fraud or violence. And it would embrace all "crimes, from the highest to the lowest, including felonies "which are punished with death, as well as misdemeanors "which are punished by imprisonment. And, moreover, if "the power is possessed by the supreme court of the State of "Wisconsin, it must belong equally to every other State in "the Union when the prisoner is within its territorial limits; "and it is very certain that the State courts would not always "agree in opinion; and it would often happen, that an act "which was admitted to be an offense, and justly punished "in one State, would be regarded as innocent, and, indeed, "as praiseworthy in another."

Suppose that, in the present case, the plaintiff in error had been convicted in the State courts and imprisoned, and that he had been a month or so later indicted in the United States court for this same offense; that, armed with criminal process, the marshal of the United States had demanded the prisoner from the warden of the State penitentiary; that he had been refused. Can there be any doubt that the United States authorities would have been justified in taking him,

and that this court, if such a case were before it, would unhesitatingly maintain the jurisdiction of the courts of the United States over that of the State courts—in other words, "the *exclusive jurisdiction* of the United States?" Can it make, ought it to make, any difference because the United States does not choose to exercise its right in the matter? Ought the unfortunate citizen to be made into a sort of "legal shuttlecock," to be knocked about between these conflicting jurisdictions?

X.

For these and other considerations, your petitioner humbly prays this honorable court to grant this his petition for a rehearing in this cause.

JOHN E. SEXTON,
Plaintiff in Error,
By JAMES PARKER, *Counsel.*

The undersigned, an attorney and counsellor of this honorable court and counsel for the petitioner, John E. Sexton, plaintiff in error in the above-stated cause, hereby certifies that in his opinion the grounds set forth in the foregoing petition for rehearing of said cause are valid and sufficient to justify and require such rehearing, and that the same is not made for delay.

JAMES PARKER,
Counsel for John E. Sexton,
Plaintiff in Error, Petitioner.

Dated MAY 20, 1903.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

JOHN E. SEXTON,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

MOTION TO DISMISS OR TO AFFIRM.

Comes now the defendant in error, by its attorney and counsel, appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction and because the judgment or decree which is sought to be reviewed by said writ is a judgment or decree duly given, made and entered, by the Supreme Court of the State of California, and that it fully appears from the record herein:

FIRST.—That no Federal question properly arose in the cause in which said judgment or decree complained of was made, nor in the judgment or decree of the Supreme Court of California therein, nor in any decree, judgment, act, or proceeding therein, nor in any judgment, act, or proceeding sought to be reviewed under this writ.

SECOND.—That it does not appear from the record in this cause that the decision or judgment and decree of the State court complained of was or is repugnant to the Constitution, or to any treaty, or to any law, of the United States.

THIRD.—That the only errors assigned by the plaintiff in error in this cause are that the Supreme Court of the State of California erred in said action in deciding therein that Section 518 of the Penal Code of the State of California is not in conflict with, and is not repugnant to, the provisions of Section 1, Article III, and with Section 1 of Article XIV of the Constitution of the United States, and with Section 711 and with Section 5484 of the Revised Statutes of the United States.

FOURTH.—That Sections 518 and 519 of the Penal Code of the State of California are not in conflict with, and are not repugnant to, the provisions of Section 1 of Article III, nor with Section 1 of Article XIV of the Constitution of the United States, nor with Section 711 and with Section 5484 of the Revised Statutes of the United States.

MOTION TO AFFIRM.

And the said defendant in error, by its attorney and counsel, as aforesaid, also moves the Court to affirm the judgment and decree, to review which said writ of error was herein ordered, although the record in said case may show that this Court has jurisdiction of the premises, which said motion to affirm is made for the following reasons, to wit:

FIRST.—Because of each and all of the reasons and grounds above specified.

SECOND.—That it is manifest from the record herein that the reasons assigned for the taking of the writ were and are frivolous, and that it was taken for delay only.

TIREY L. FORD,
Attorney-General of the State of California, and
C. N. POST,
Assistant Attorney-General of the State of California,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

October Term, 1901.

JOHN E. SEXTON,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND AFFIRM.

To George D. Collins, Esq., Attorney for Plaintiff in Error:

Please take notice that on Monday, the 4th day of November, A. D. 1901, at the opening of the court, or as soon thereafter as counsel can

be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States at the courtroom of said court, in the Capitol Building, in Washington, D. C., for the decision of said court thereon. Annexed hereto is a copy of the brief or argument to be submitted with said motions in support thereof.

TIREY L. FORD,
Attorney-General of the State of California, and
C. N. POST,
Assistant Attorney-General of the State of California,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

This is a motion to dismiss or affirm an appeal taken by the plaintiff in error, John E. Sexton, from the final judgment and decree of the Supreme Court of the State of California affirming the judgment rendered in favor of the defendant in error in the Superior Court of the State of California, in and for said County of El Dorado, in said State.

THE INDICTMENT.

The above entitled cause was prosecuted by indictment, a copy of which indictment, with the endorsements thereon, was and is in the words and figures following, that is to say:

"In the Supreme Court of the State of California.

"INDICTMENT FOR EXTORTION.

"In the Superior Court of the County of El Dorado, State of California. The 25th day of November, A. D. 1899.

"THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
"JOHN E. SEXTON AND S. H. BRIGGS.

"John E. Sexton and S. H. Briggs are accused by the grand jury of the said County of El Dorado, by this indictment, of the crime of extortion, committed as follows, to wit: The said John E. Sexton and S. H. Briggs, prior to the finding of this indictment, and on or about the 20th day of June, A. D. 1898, at the County of El Dorado, State of California, did wilfully, unlawfully and feloniously obtain from one C. Greenewald certain personal property

consisting of money, the property of the said C. Greenewald, to the amount and value of thirty dollars, with the consent of said Greenewald induced by the wrongful use and exercise upon him of fear by means of a threat then and there made by the said John E. Sexton and S. H. Briggs to accuse him, the said Greenewald, of the crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

"ABE DARLINGTON,
"District Attorney.

"Witnesses sworn and examined before the Grand Jury: C. Greenewald, I. Jacobs, Kate Thompson and John E. Sexton.

"(Endorsed:)
"1256.
"In the Superior Court of El Dorado, State of California.
"The People of the State of California against John E. Sexton and S. H. Briggs.
"Indictment for extortion.
"A true bill.

"R. P. PATTERSON,
"Foreman of the Grand Jury.

"Presented and filed in open Superior Court on this the 25th day of November, 1899.

"JOHN P. FISHER,
"Clerk."

PROCEEDINGS IN SUPERIOR COURT.

After the finding of the above indictment such proceedings were had in the Superior Court of the State of California, in and for the County of El Dorado, in said State, that a verdict of guilty was rendered against the defendant therein (plaintiff in error here) and a judgment of conviction entered in pursuance of said verdict.

PROCEEDINGS IN SUPREME COURT OF CALIFORNIA.

An appeal was taken from the judgment entered in said Superior Court to the Supreme Court of the State of California, wherein such proceedings were had that thereafter, to wit, on the 26th day of February, 1901, the Supreme Court of the State of California rendered its judgment in said case against the appellant therein (the plaintiff in error here), and thereafter, to wit, on the 28th day of March, A. D. 1901, said Court denied the petition of said appellant (plaintiff in error here) for a rehearing in said cause.

OPINION OF SUPREME COURT OF CALIFORNIA.

The Supreme Court of the State of California, in making and entering its judgment in said cause, filed therein the following opinion and order:

"Appeal from the Superior Court of El Dorado County.—M. P. Bennett, Judge.

"For Appellant, F. Adams, James W. Keyes, Clarke Howard.

"For Respondent, Attorney-General Ford.

"Filed February 26, 1901.

"DEPARTMENT ONE.

"THE PEOPLE OF THE STATE OF CALIFORNIA, "Plaintiff and Respondent, vs. "JOHN E. SEXTON, "Defendant and Appellant.	Crim. No. 651.

"Defendant has been convicted of the crime of extortion, and appeals to this Court. By the indictment it was alleged that defendant obtained thirty dollars from one Greenwald under fear induced by threats upon the part of defendant to accuse him (Greenwald) of the 'crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purposes of packing cigars therein.' In substance it may be said that defendant threatened to accuse Greenwald of violating the United States revenue laws, and under fear induced by such threat secured from Greenwald the aforesaid sum of thirty dollars.

"It is insisted that the facts alleged do not constitute an offense against the laws of the State of California, but, upon the contrary, constitute a crime exclusively within the jurisdiction of the Federal court. We find nothing in this contention. The defendant is charged with the crime of extortion, an offense directly within the jurisdiction of the State courts. He is not charged with a violation of the Federal statute, but with a violation of a State statute. He threatened to accuse a man with the commission of a crime. It makes no difference if that crime be solely triable in the Federal courts, for defendant is not being tried for that crime. If he had threatened to have Greenwald arrested upon the charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offense would be one against the laws of this State. It would be extortion as defined by the Penal Code of this State, and this Court would not be concerned as to whether or not defendant's crime was also punishable under Federal laws. The Court finds no substantial defect in the indictment, and the demurrer thereto is not well taken.

"A demurrer to a previous indictment laid against defendant was sustained, and the case referred to a second Grand Jury, which Grand Jury returned the indictment now before the Court. It is

insisted that defendant's second prosecution should have been based upon a preliminary examination, and an information filed thereon. There is no merit in this position. When Section 1008 of the Penal Code says that after such order of resubmission the defendant 'may be examined before a magistrate,' the word *may* takes its usual, ordinary meaning, and is not to be construed as *must*.

"The stenographer who was present and took the testimony before the Grand Jury was sworn as a witness, and testified as to certain evidence given by defendant before that body. This evidence in no sense amounted to a confession, and hence no question of duress or menace upon the part of defendant at the time he gave his testimony is involved herein. Under such circumstances defendant's statements, whether made in the Grand Jury room, at the trial, or extra judicial, may be used against him, and we see no error in their admission here. The stenographer had the right to read from her notes of his evidence taken at the time, if she was so inclined. The statute contemplates that she may thus refresh her recollection. (Section 2047, C. C. P.; Burbank vs. Dennis, 101 Cal. 104.)

"We find nothing further in the record demanding consideration.

"While the evidence tending to support the verdict in this case is very weak, we are not prepared to say it is insufficient. Owing to the peculiar circumstances of the case, and the character of the evidence relied upon to support the verdict, we think the law would have been well satisfied with a judgment finding the defendant guilty of a misdemeanor. But that is a matter beyond review by this Court.

"For the foregoing reasons the judgment and orders are affirmed.

"GAROUTTE, J.

"We concur:

"VAN DYKE, J.,

"HARRISON, J."

ASSIGNMENT OF ERROR.

The following is a full and complete copy of the assignment of errors filed herein by plaintiff in error:

"JOHN E. SEXTON,

Plaintiff in Error,

vs.

"THE PEOPLE OF THE STATE OF CALIFORNIA,

Defendant in Error.

"Of October Term, in the year of our Lord one thousand nine hundred.

"Afterwards, to wit, on the 30th day of March, A. D. 1901, in the same term, before the Justices of the Supreme Court of the United States, comes the said John E. Sexton, by Mr. George D. Collins,

his counsel, and says that in the record and proceedings in the action of the People of the State of California vs. John E. Sexton, Crim. No. 651 in the Supreme Court of the State of California, there is manifest error in this, to wit:

"1. That the Supreme Court of the State of California committed manifest error in said action in deciding therein that Section 518 of the Penal Code of the State of California is not in conflict with and is not repugnant to the provisions of Section 1 of Article III, and with Section 1 of Article XIV of the Constitution of the United States, and with Section 711 and Section 5484 of the Revised Statutes of the United States.

"2. That your petitioner, defendant in said action, is by the judgment of the Superior Court in and for the County of El Dorado, and by the said judgment of the Supreme Court of the State of California affirming said judgment of said Superior Court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of Section 1 of Article XIV of the Constitution of the United States.

"Whereas, by the law of the land, said judgment of the Supreme Court of the State of California ought to have been given for the said John E. Sexton, plaintiff in error, and against the People of the State of California, defendant in error; and the said plaintiff in error, the said John E. Sexton, prays the judgment of the Supreme Court of the State of California to be reversed, annulled and altogether held for nothing, and that he be restored to all things which he hath lost by occasion of the said judgment.

"GEORGE D. COLLINS,
"Attorney for Plaintiff in Error, John E. Sexton.

"(Endorsed:) Filed Mar. 30, 1901. Geo. W. Root, Clerk, by W. E. Boody, Deputy."

ARGUMENT.

We shall argue

1. That this Court has no jurisdiction over the questions or the subject-matter presented by the writ of error herein, for that no Federal question properly arises therein.

2. That Sections 518 and 519 of the Penal Code of the State of California are not in conflict with, and are not repugnant to, the provisions of Section 1 of Article III, nor with Section 1 of Article XIV of the Constitution of the United States, nor with either Section 711 or Section 5484 of the Revised Statutes of the United States.

3. That it is manifest that the writ of error herein was taken for delay only, and that no other or different judgment could have been lawfully entered therein by the Supreme Court of the State of California.

FIRST POINT.

Section 518 of the California Penal Code is not in Conflict with, nor Repugnant to, Section 1 of Article III, Section 1 of Article XIV of the Constitution of the United States, nor with Sections 711 and 5484 of the U. S. Revised Statutes.

The only questions herein presented by the record are thus stated in plaintiff's assignment of errors:

> "1. That the Supreme Court of the State of California committed manifest error in said action in deciding therein that Section 518 of the Penal Code of the State of California is not in conflict with, and is not repugnant to, the provisions of Section 1 of Article III and with Section 1 of Article XIV of the Constitution of the United States, and with Section 711 and Section 5484 of the Revised Statutes of the United States.
>
> "2. That your petitioner, defendant in said action, is by the judgment of the Superior Court in and for the County of El Dorado, and by the said judgment of the Supreme Court of the State of California affirming said judgment of said Superior Court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of Section 1 of Article XIV of the Constitution of the United States."

Plaintiff, in his foregoing assignment of errors, has seen fit to incorporate therein only Section 518 of the Penal Code of California, which section defines generally the crime of extortion and is as follows:

> Sec. 518. "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."
>
> Section 518, Penal Code.

It is Section 519 of said Code, however, that specifically defines the threats which may induce the "fear" mentioned in Section 518, and by which alone the crime of extortion may be committed by the wrongful use of "fear."

Said Section 519 provides as follows, to wit:

> Sec. 519. "Fear such as will constitute extortion may be induced by a threat, either:
>
> "1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or
>
> "2. To accuse him, or any relative of his or member of his family, of any crime; or
>
> "3. To expose, or impute to him or them, any deformity or disgrace; or
>
> "4. To expose any secret affecting him or them."
>
> Section 519, Penal Code.

(It will be observed that the indictment herein charges in the language of both of said sections of the California Penal Code.)

Section 1 of Article III, and Section 1 of Article XIV of the Constitution of the United States, and Section 711 and Section 5484 of the Revised Statutes of the United States, referred to in the foregoing assignment of errors, read as follows:

> Sec. 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."
>
> Sec. 1, Art. III, Constitution.

> Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Sec. 1, Art. XIV, Constitution.

> Sec. 711. "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States.
>
> "First—Of all crimes and offenses cognizable under the authority of the United States. * * *"
>
> Sec. 711, Revised Statutes of the United States.

> Sec. 5484. "Every person who shall receive any money or other valuable thing under a threat of informing, or as a consideration for not informing, against any violation of any internal-revenue law, shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution."
>
> Sec. 5484, Revised Statutes of the United States.

It thus affirmatively appears that the sole questions involved herein are whether or not Sections 518 and 519 of the Penal Code of California are in conflict with and repugnant to Section 1 of Article III, and Section 1 of Article XIV, of the Constitution of the United States, and Sections 711 and 5484 of the Revised Statutes of the United States.

We shall first discuss the relation of Sections 518 of the Penal Code of California to Section 1 of Article III of the Federal Constitution.

Section 518 of the Penal Code of California, *supra*, simply defines in general terms the crime of extortion, and it is not in conflict with, nor repugnant to, Section 1 of Article III of the Federal Constitution, unless it shall be held, that, by said section of the Federal Constitution, and said Section 711 of the Revised Statutes, the Federal courts were granted, in express terms, exclusive jurisdiction of the crime of extortion, or that jurisdiction over said crime was granted thereby to the Federal courts and prohibited to State courts, or that jurisdiction over said crime having been by said sections of the Federal Constitution and Revised Statutes, granted to the Federal courts, an exercise of similar jurisdiction by State courts would be utterly incompatible therewith. Article III of the Constitution of the United States, and its operation on the jurisdiction of State courts, was very thoroughly discussed in the comparatively recent case of

P. T. Fruit Co. vs. Henderson, Sup. Ct. Rep. 686–9.

Mr. Justice Harlan delivered the opinion of the Court, and said:

"These questions were the subject of earnest consideration while the Constitution was before the people of the United States for acceptance or rejection. It was contended by some who recommended its rejection that the proposed Constitution, without legislation by Congress, would give to the one Supreme Court established by it, and to such other courts as Congress should from time to time create, exclusive jurisdiction in all such cases or controversies. That interpretation was disputed, and Hamilton, in the Federalist (page 607), said: 'The principles established in a former paper teach us that the State will retain all preëxisting authorities, which may not be exclusively delegated to the Federal head, and that this exclusive delegation can only exist in one of three cases: Where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as the latter. And, under this impression, I shall lay it down as a rule that the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.' He recognized the fact that there was apparent support to the objection referred to in the clause 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress shall from time to time ordain and establish.' That clause, he said, 'might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their

authority is to extend, or simply to denote that the organs of the national judiciary should be one Supreme Court and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested through one supreme tribunal and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals. And, as the first would amount to an alienation of State power by implication, the last appears to me the most defensible construction.' He also said that the judicial power of every government 'looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those in Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When, in addition to this, we consider the State governments and the National government, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive that the State courts would have a concurrent jnrisdiction in cases arising under the laws of the Union, where it was not expressly prohibited.' (Federalist, No. 82.)

"The first Congress acted upon this view of the scope and effect of the Constitution when it passed the judiciary act of 1789, creating the Circuit and District Courts of the United States, and defining their jurisdiction."

P. T. Fruit Co. vs. Henderson, Sup. Ct. Rep. 686–689.

We have quoted only a small portion of this opinion, but desire to cite it all, and we confidently assert that the reasoning contained and the authorities cited therein are diametrically opposed to either of the three constructions of said Section 1 of Article III, suggested by us as being necessary to support plaintiff's contention.

We will next consider whether or not said Section 518 of the California Penal Code is in conflict with, or repugnant to, Section 1 of Article XIV of the Federal Constitution.

A. The only manner in which said section of the California Penal Code could conflict with or be repugnant to said Section 1 of Article XIV would be in that it abridges the privileges or immunities of citizens of the United States, or deprives persons of life, liberty, or property without due process of law, or denies to persons within the jurisdiction of said State the equal protection of the law.

That said California penal section does not abridge the privileges or immunities of citizens of the United States is clearly decided in the

Slaughter-House Cases, 16 Nall. 36–83.

Mr. Justice Miller delivered the opinion of the Court, and we quote the following therefrom, to wit:

"The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

"It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

"We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

"The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which preceded it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

Slaughter-House Cases, 83 U. S. Rep. 73–74.

In the recent case of

Anderson vs. The United States, Supreme Court Rep., Vol. 18,

Mr. Justice Harlan, in delivering the opinion of the Court, quoted the above quoted language from the Slaughter-House Cases with approval.

We quote from Anderson vs. The United States, *supra*, as follows, to wit:

> "It cannot be doubted that each of the original States had, prior to the adoption of the Constitution, complete and exclusive jurisdiction, by its judicial tribunals, over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. (Tennessee vs. Davis, 100 U. S. 257.)
>
> "If it was intended to withdraw from the State authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to special cases and controversies; leaving to the Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States.
>
> "And in Robb vs. Connolly, 111 U. S. 624, 636, 4 Sup. Ct. 544, it was held that, in defining and regulating the jurisdiction of the courts of the United States, Congress has taken care not to exclude the jurisdiction of the State courts from every case to which by the Constitution the judicial power of the United States extends. The reason given for this view was that upon the State courts, equally with the courts of the Union, rested the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights were involved in any suit or proceeding before them; for, the court said, 'the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.'"
>
> Vol. 18, Sup. Ct. Rep., 688–689.

B. Said Penal Section 518 of California does not deprive any person of life, liberty, or property without due process of law; it is a statute of general application, and every citizen of California is alike amenable to its provisions.

When a person accused of crime within a State is subjected, like all other persons in the State, to the law in its regular course of administration in courts of justice, the judgment so arrived at cannot be held to be such an unrestrained and arbitrary exercise of power as to be utterly void.

The Fourteenth Amendment to the Constitution was not designed to interfere with the power of a State to protect the lives, liberty, and

property of its citizens, nor with the exercise of that power in the adjudications of the courts of the State in administering the process provided by its laws.

In re Converse, 137 U. S. 624–631;
Leeper vs. Texas, 139 U. S. 467–468.

This Court, in the case of Hurtado vs. California, 110 U. S. 516, held that a prosecution as prescribed by the Constitution and laws of California was a prosecution by due process of law within the meaning of that phrase as used in the Fourteenth Amendment to the Constitution of the United States. That the meaning of the words "due process of law" in the Fourteenth Amendment refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, and in so holding quoted with approval from two former decisions of this Court, as follows:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by common law cannot be taken away without due process; but the law, itself, as a rule of conduct, may be changed at the will or even at the whim of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."
>
> Munn vs. Illinois, 94 U. S. 113.

> "A trial by jury in suits at common law pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State."
>
> Walker vs. Savinet, 92 U. S. 90.

The Hurtado case has been followed and affirmed in:

Norstrom vs. Washington, 164 U. S. 705;
Creamer vs. Washington, 168 U. S. 124;
Durrant vs. Hale, 168 U. S. 705.

C. Said Penal Section 518 of California does not deny to any person within the jurisdiction of that State the equal protection of the law,

because it is a statute of general application, and every person within the State is amenable to its provisions.

D. Said Section 518 is not in conflict with, nor repugnant to, Sections 711 and 5484 of the Revised Statutes, for the same reasons that it is not in conflict with, nor repugnant to, Section 1 of Article III, and Section 1 of Article XIV of the Constitution of the United States.

SECOND POINT.

Section 519 of the Penal Code of California is, within the Jurisdiction of that State, Concurrent with Section 5484 of the Revised Statutes of the United States.

For the same reasons that we gave in support of the constitutionality of said Section 518, *supra*, we contend that Section 519 of the California Penal Code is not obnoxious to the constitutional objections urged by plaintiff against said Section 518, and we will cite other authorities in addition in support of Section 519.

It is true that one of the provisions of subdivision 2 of Section 519 contemplates the same offense contemplated by Section 5484 of the Revised Statutes of the United States, and that is all there is of plaintiff's case.

In addition to the contention that said Section 519 is not in conflict with, nor repugnant to, the said Federal statutes and constitutional provisions under the reserved police powers of the sovereign State of California, we also contend that in prosecutions had by the State of California under said Section 519, said State exercises a concurrent power which has been recognized and approved by this Court time and again, and in support thereof we cite the following authorities:

"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State."

L. & N. Railroad vs. Kentucky, 161 U. S. 701;
Beer Company vs. Massachusetts, 97 U. S. 25–34;
Stone vs. Mississippi, 701 U. S. 818.

"The Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens."

M. & St. L. R. Co. vs. Beckwith, 129 U. S. 33;
Barbier vs. Connolly, 113 U. S. 27–31.

Said Mr. Justice Story, delivering the opinion of the Court in case of Houston vs. Moore, 5 Wheat. 48–49:

"The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance also to State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased, by the consent of the Legislature of the State in which the same shall be, for forts, arsenals, dockyards, etc.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this Court have already held, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the Eleventh Amendment to the Constitution, but upon the soundest principles of general reasoning."

"The United States court does not desire to be understood in any manner whatever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States."

Prigg vs. Com. of Pennsylvania, 41 U. S. 625;

Fertilizing Co. vs. Hyde Park, 97 U. S. 667.

Said the Court in a case wherein the question of commercial regulation was being discussed:

"In Gibbons against Ogden, 9 Wheaton, 204, the Court say, if a State, in passing laws on a subject acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers are identical. Although the means used in their execution may sometimes approach each other, so nearly as to be con-

founded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In page 209, the Court say: Since, however, in regulating their own purely internal affairs, whether of trading or of police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to an Act of Congress passed in pursuance of the Constitution; they would inquire whether there was such collision in that case, and they came to the conclusion that there was.

"From this it appears that whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power; subject only, say the Court, to this limitation, that in the event of collision, the law of the State must yield to the law of Congress. The Court must be understood, of course, as meaning that the law of Congress is passed upon the subject within the sphere of its power.

"Even then, if the section of the Act in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision exist."

City of New York vs. Miln, 11 Pet. 136–7.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. (Boyd vs. Alabama, 94 U. S. 645.)"

Beer Co. vs. Massachusetts, 94 U. S. 33.

This same doctrine is most forcibly announced by Mr. Justice Grier, in his concurring opinion, in the case of

The License Cases, 5 How. 631,

from which we quote as follows:

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.' Without attempting to

define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category."

In the case of Cross vs. North Carolina, 132 U. S. 139, wherein the plaintiff in error had been convicted of forgery in the State courts of North Carolina, the contention here was that the offense of which he was convicted was cognizable only in the courts of the United States under Section 5209, Revised Statutes of the United States.

This Court held that the crime contemplated by Section 5209, Revised Statutes of the United States, did not necessarily involve the crime of which plaintiff in error had been convicted in the State courts of North Carolina, and the judgment was affirmed; but in so holding, this Court, speaking through Mr. Justice Harlan, used the following language, to wit:

> "The argument on behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. This doctrine is illustrated in United States vs. Marigold, 9 How. 560, 569; Fox vs. Ohio, 5 How. 410, 433; Moore vs. Illinois, 14 How. 13, 19; and Ex parte Siebold, 100 U. S. 371, 390; in the first of which cases it was said that 'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either as appropriate to its character in reference to each.'"
>
> Cross vs. North Carolina, 132 U. S. 139.

This same doctrine was again laid down by this Court in the case of

In re Loney, 134 U. S. 375,

wherein Cross vs. North Carolina, *supra*, and other cases were cited with approval, and the following language used by Mr. Justice Gray, who delivered the opinion of the Court, to wit:

> "There are cases (the most familiar of which are those making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as the laws of the United States, and punishable by the judiciary of either. (Fox vs. Ohio, 5 How. 410; United States vs. Marigold, 9 How. 560; Moore vs. Illinois, 14 How. 13; Ex parte Siebold, 100 U. S. 371–390; Cross vs. North Carolina, 132 U. S. 131.)"

Mr. Justice Gray, in delivering the opinion of the Court in the case of In re Green, 134 U. S. 378,

said:

"The question whether the State has concurrent power with the United States to punish fraudulent voting for Representatives in Congress is not presented by the record before us. It may be that it has. (Ex parte Siebold, 100 U. S. 371.)"

THIRD POINT.

It Is Manifest that the Writ of Error Was Taken for Delay Only, and that No Other or Different Judgment Could Have Been Lawfully Entered Herein by the Supreme Court of the State of California.

Should the Court conclude that it has jurisdiction to consider the question of the alleged conflict between Sections 518 and 519 of the California Code, and said sections of the Federal Constitution and Revised Statutes, then we have not the slightest doubt but that the motion to affirm the judgment will be granted, for the reason that a consideration of the law and the record in this case demonstrates so clearly that plaintiff has not been deprived of due process of law as to make it distinctly manifest that the writ herein was taken solely for delay, and that the question upon which jurisdiction depends is so frivolous as not to need further argument.

Swope vs. Leffingwell, 105 U. S. 3;
Evans vs. Brown, 109 U. S. 180;
Foster vs. Kansas, 112 U. S. 205;
Chamite City vs. Trader, 132 U. S. 211;
The Alaska, 130 U. S. 201;
Northern Pacific R. R. Co. vs. Amato, 144 U. S. 465;
Douglass vs. Wallace, 161 U. S. 346;
Richardson vs. Louisville, etc. R. R. Co., 69 U. S. 128.

Where the appellant has a color of right to the dismissal of the appeal, he may unite with a motion therefor one to affirm the decree on the ground that the constitutionality of the statute was settled by its former decision, or that it was taken for delay only.

Hinckley vs. Morton, 103 U. S. 764;
Foster vs. Kansas, 112 U. S. 205;

Evans vs. Brown, 109 U. S. 180;
Chanute City vs. Trader, 132 U. S. 211;
Swope vs. Leffingwell, 105 U. S. 3;
Northern Pacific R. Co. vs. Amato, 144 U. S. 465;
Douglas vs. Wallace, 161 U. S. 346;
Richardson vs. Louisville, etc., R. R., 169 U. S. 128;
The Alaska, 130 U. S. 201;
Crane Iron Co. vs. Hoagland, 108 U. S. 5;
Carey vs. Houston, etc., Co., 150 U. S. 170;
Texas Land & Cattle Co. vs. Scott;
Callan vs. Bransford, 139 U. S. 197;
Aspen, etc., Co. vs. Billings, 150 U. S. 31;
National Bank, etc., vs. Anderson, 172 U. S. 573;
Bienville Water, etc., Co. vs. Mobile, 175 U. S. 109;
Abbott vs. Tacoma Bank of Commerce, 175 U. S. 409.

Respectfully submitted.

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C. N. POST,
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FILE COPY.

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FILED
FEB 24 1903
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

(October Term, 1902.)

No. [redacted]

JOHN E. SEXTON,
Plaintiff in Error.

AGAINST

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

R. WOODLAND GATES,
U. S. WEBB, Attorney-General of the State of California, and
GEO. A. STURTEVANT, Deputy Attorney-General of the State of California,
Attorneys for Defendant in Error.

Filed [redacted], 1903.

STATE PRINTING OFFICE,
SACRAMENTO.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

JOHN E. SEXTON,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

We shall argue

1. That this Court has no jurisdiction over the questions or the subject-matter presented by the writ of error herein, for that no Federal question properly arises therein.

2. That Sections 518 and 519 of the Penal Code of the State of California are not in conflict with, and are not repugnant to, the provisions of Section 1 of Article III, nor with Section 1 of Article XIV of the Constitution of the United States, nor with either Section 711 or Section 5484 of the Revised Statutes of the United States.

FIRST POINT.

Section 518 of the California Penal Code is not in Conflict with, nor Repugnant to, Section 1 of Article III, Section 1 of Article XIV of the Constitution of the United States, nor with Sections 711 and 5484 of the U. S. Revised Statutes.

The only questions herein presented by the record are thus stated in plaintiff's assignment of errors:

> "1. That the Supreme Court of the State of California committed manifest error in said action in deciding therein that Section 518 of the Penal Code of the State of California is not in conflict with, and is not repugnant to, the provisions of Section 1 of Article III and with Section 1 of Article XIV of the Constitution of the United States, and with Section 711 and Section 5484 of the Revised Statutes of the United States.

"2. That your petitioner, defendant in said action, is by the judgment of the Superior Court in and for the County of El Dorado, and by the said judgment of the Supreme Court of the State of California affirming said judgment of said Superior Court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of Section 1 of Article XIV of the Constitution of the United States."

Plaintiff in his foregoing assignment of errors, has seen fit to incorporate therein only Section 518 of the Penal Code of California, which section defines generally the crime of extortion and is as follows:

Sec. 518. "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

Section 518, Penal Code.

It is Section 519 of said Code, however, that specifically defines the threats which may induce the "fear" mentioned in Section 518, and by which alone the crime of extortion may be committed by the wrongful use of "fear."

Said Section 519 provides as follows, to wit:

Sec. 519. "Fear such as will constitute extortion may be induced by a threat, either:

"1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or

"2. To accuse him, or any relative of his or member of his family, of any crime; or

"3. To expose, or impute to him or them, any deformity or disgrace; or

"4. To expose any secret affecting him or them."

Section 519, Penal Code.

(It will be observed that the indictment herein charges in the language of both of said sections of the California Penal Code.)

Section 1 of Article III, and Section 1 of Article XIV of the Constitution of the United States, and Section 711 and Section 5484 of the Revised Statutes of the United States, referred to in the foregoing assignment of errors, read as follows:

SEC. 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Sec. 1, Art. III, Constitution.

Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 1, Art. XIV, Constitution.

Sec. 711. "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States.

"First—Of all crimes and offenses cognizable under the authority of the United States. * * *"

Sec. 711, Revised Statutes of the United States.

Sec. 5484. "Every person who shall receive any money or other valuable thing under a threat of informing, or as a consideration for not informing, against any violation of any internal-revenue law, shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Sec. 5484, Revised Statutes of the United States.

It thus affirmatively appears that the sole questions involved herein are whether or not Sections 518 and 519 of the Penal Code of California are in conflict with and repugnant to Section 1 of Article III, and Section 1 of Article XIV, of the Constitution of the United States, and Sections 711 and 5484 of the Revised Statutes of the United States.

We shall first discuss the relation of Sections 518 of the Penal Code of California to Section 1 of Article III of the Federal Constitution.

Section 518 of the Penal Code of California, *supra*, simply defines in general terms the crime of extortion, and it is not in conflict with, nor repugnant to, Section 1 of Article III of the Federal Constitution, unless it shall be held, that, by said section of the Federal Constitution, and said Section 711 of the Revised Statutes, the Federal courts were granted, in express terms, exclusive jurisdiction of the crime of extortion, or that jurisdiction over said crime was granted thereby to the Federal courts and prohibited to State courts, or that jurisdiction over said crime having been by said sections of the Federal Constitution and Revised Statutes, granted to the Federal courts, an exercise of similar jurisdiction by State courts would be utterly incompatible therewith. Article III of the Constitution of the United States, and its operation

on the jurisdiction of State courts, was very thoroughly discussed in the comparatively recent case of

P. T. Fruit Co. vs. Henderson, Sup. Ct. Rep. 686–9.

Mr. Justice Harlan delivered the opinion of the Court, and said:

"These questions were the subject of earnest consideration while the Constitution was before the people of the United States for acceptance or rejection. It was contended by some who recommended its rejection that the proposed Constitution, without legislation by Congress, would give to the one Supreme Court established by it, and to such other courts as Congress should from time to time create, exclusive jurisdiction in all such cases or controversies. That interpretation was disputed, and Hamilton, in the Federalist (page 607), said: 'The principles established in a former paper teach us that the State will retain all preëxisting authorities, which may not be exclusively delegated to the Federal head, and that this exclusive delegation can only exist in one of three cases: Where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as the latter. And, under this impression, I shall lay it down as a rule that the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.' He recognized the fact that there was apparent support to the objection referred to in the clause 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress shall from time to time ordain and establish.' That clause, he said, 'might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend, or simply to denote that the organs of the national judiciary should be one Supreme Court and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested through one supreme tribunal and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals. And, as the first would amount to an alienation of State power by implication, the last appears to me the most defensible construction.' He also said that the judicial power of every government 'looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those in Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When, in addition to this, we con-

sider the State governments and the National government, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in cases arising under the laws of the Union, where it was not expressly prohibited.' (Federalist, No. 82.)

"The first Congress acted upon this view of the scope and effect of the Constitution when it passed the judiciary act of 1789, creating the Circuit and District Courts of the United States, and defining their jurisdiction."

P. T. Fruit Co. vs. Henderson, Sup. Ct. Rep. 686–689.

We have quoted only a small portion of this opinion, but desire to cite it all, and we confidently assert that the reasoning contained and the authorities cited therein are diametrically opposed to either of the three constructions of said Section 1 of Article III, suggested by us as being necessary to support plaintiff's contention.

We will next consider whether or not said Section 518 of the California Penal Code is in conflict with, or repugnant to, Section 1 of Article XIV of the Federal Constitution.

A. The only manner in which said section of the California Penal Code could conflict with or be repugnant to said Section 1 of Article XIV would be in that it abridges the privileges or immunities of citizens of the United States, or deprives persons of life, liberty, or property without due process of law, or denies to persons within the jurisdiction of said State the equal protection of the law.

That said California penal section does not abridge the privileges or immunities of citizens of the United States is clearly decided in the

Slaughter-House Cases, 16 Nall. 36–83.

Mr. Justice Miller delivered the opinion of the Court, and we quote the following therefrom, to wit:

"The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

"It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

"We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

"The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which preceded it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

Slaughter-House Cases, 83 U. S. Rep. 73–74.

In the recent case of

Anderson vs. The United States, Supreme Court Rep., Vol. 18,

Mr. Justice Harlan, in delivering the opinion of the Court, quoted the above quoted language from the Slaughter-House Cases with approval.

We quote from Anderson vs. The United States, *supra*, as follows, to wit:

"It cannot be doubted that each of the original States had, prior to the adoption of the Constitution, complete and exclusive jurisdiction, by its judicial tribunals, over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. (Tennessee vs. Davis, 100 U. S. 257.)

"If it was intended to withdraw from the State authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to special cases and controversies; leaving to the Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States.

"And in Robb vs. Connolly, 111 U. S. 624, 636, 4 Sup. Ct. 544, it was held that, in defining and regulating the jurisdiction of the courts of the United States, Congress has taken care not to exclude the jurisdiction of the State courts from every case to which by the Constitution the judicial power of the United States extends. The reason given for this view was that upon the State courts, equally with the courts of the Union, rested the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights were involved in any suit or proceeding before them; for, the court said 'the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.'"

Vol. 18, Sup. Ct. Rep., 688–689.

B. Said Penal Section 518 of California does not deprive any person of life, liberty, or property without due process of law; it is a statute of general application, and every citizen of California is alike amenable to its provisions.

When a person accused of crime within a State is subjected, like all other persons in the State, to the law in its regular course of administration in courts of justice, the judgment so arrived at cannot be held to be such an unrestrained and arbitrary exercise of power as to be utterly void.

The Fourteenth Amendment to the Constitution was not designed to interfere with the power of a State to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of the State in administering the process provided by its laws.

In re Converse, 137 U. S. 624–631;
Leeper vs. Texas, 139 U. S. 467–468.

This Court, in the case of Hurtado vs. California, 110 U. S. 516, held that a prosecution as prescribed by the Constitution and laws of California was a prosecution by due process of law within the meaning of that phrase as used in the Fourteenth Amendment to the Constitution of the United States. That the meaning of the words "due process of law" in the Fourteenth Amendment refers to that law of the land in each State which derives its authority from the inherent and reserved

powers of the State, and in so holding quoted with approval from two former decisions of this Court, as follows:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by common law cannot be taken away without due process; but the law, itself, as a rule of conduct, may be changed at the will or even at the whim of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."
>
> Munn vs. Illinois, 94 U. S. 113.

> "A trial by jury in suits at common law pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State."
>
> Walker vs. Savinet, 92 U. S. 90.

The Hurtado case has been followed and affirmed in:

Norstrom vs. Washington, 164 U. S. 705;

Creamer vs. Washington, 168 U. S. 124;

Durrant vs. Hale, 168 U. S. 705.

C. Said Penal Section 518 of California does not deny to any person within the jurisdiction of that State the equal protection of the law, because it is a statute of general application, and every person within the State is amenable to its provisions.

D. Said Section 518 is not in conflict with, nor repugnant to, Sections 711 and 5484 of the Revised Statutes, for the same reasons that it is not in conflict with, nor repugnant to, Section 1 of Article III, and Section 1 of Article XIV of the Constitution of the United States.

SECOND POINT.

Section 519 of the Penal Code of California is, within the Jurisdiction of that State, Concurrent with Section 5484 of the Revised Statutes of the United States.

For the same reasons that we gave in support of the constitutionality of said Section 518, *supra*, we contend that Section 519 of the California Penal Code is not obnoxious to the constitutional objections urged by plaintiff against said Section 518, and we will cite other authorities in addition in support of Section 519.

In addition to the contention that said Section 519 is not in conflict with, nor repugnant to, the said Federal statutes and constitutional provisions under the reserved police powers of the sovereign State of California, we also contend that in prosecutions had by the State of California under said Section 519, said State exercises at least a concurrent power which has been recognized and approved by this Court time and again, and in support thereof we cite the following authorities:

"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State."

L. & N. Railroad vs. Kentucky, 161 U. S. 701;

Beer Company vs. Massachusetts, 97 U. S. 25-34;

Stone vs. Mississippi, 701 U. S. 818.

"The Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens."

M. & St. L. R. Co. vs. Beckwith, 129 U. S. 33;

Barbier vs. Connolly, 113 U. S. 27-31.

Said Mr. Justice Story, delivering the opinion of the Court in case of

Houston vs. Moore, 5 Wheat. 48-49:

"The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance also to State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to

the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased, by the consent of the Legislature of the State in which the same shall be, for forts, arsenals, dockyards, etc.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this Court have already held, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the Eleventh Amendment to the Constitution, but upon the soundest principles of general reasoning."

"The United States court does not desire to be understood in any manner whatever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States."

Prigg vs. Com. of Pennsylvania, 41 U. S. 625;

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Said the Court in a case wherein the question of commercial regulation was being discussed:

"In Gibbons against Ogden, 9 Wheaton, 204, the Court say, if a State, in passing laws on a subject acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers are identical. Although the means used in their execution may sometimes approach each other, so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In page 209, the Court say: Since, however, in regulating their own purely internal affairs, whether of trading or of police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to an Act of Congress passed in pursuance of the Constitution; they would inquire whether there was such collision in that case, and they came to the conclusion that there was.

"From this it appears that whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power; subject only, say the Court, to this

limitation, that in the event of collision, the law of the State must yield to the law of Congress. The Court must be understood, of course, as meaning that the law of Congress is passed upon the subject within the sphere of its power.

"Even then, if the section of the Act in question could be considered as partaking of the nature of a commercial regulation, the principal here laid down would save it from condemnation, if no such collision exist."

City of New York vs. Miln, 11 Pet. 136–7.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. (Boyd vs. Alabama, 94 U. S. 645.)"

Beer Co. vs. Massachusetts, 94 U. S. 33.

This same doctrine is most forcibly announced by Mr. Justice Grier, in his concurring opinion, in the case of

The License Cases, 5 How. 631,

from which we quote as follows:

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category."

In the case of Cross vs. North Carolina, 132 U. S. 139, wherein the plaintiff in error had been convicted of forgery in the State courts of North Carolina, the contention here was that the offense of which he was convicted was cognizable only in the courts of the United States under Section 5209, Revised Statutes of the United States.

This Court held that the crime contemplated by Section 5209, Revised Statutes of the United States, did not necessarily involve the crime of which plaintiff in error had been convicted in the State courts of North

Carolina, and the judgment was affirmed; but in so holding, this Court, speaking through Mr. Justice Harlan, used the following language, to wit:

> "The argument on behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. This doctrine is illustrated in United States vs. Marigold, 9 How. 560, 569; Fox vs. Ohio, 5 How. 410, 433; Moore vs. Illinois, 14 How. 13, 19; and Ex parte Siebold, 100 U. S. 371, 390; in the first of which cases it was said that 'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either as appropriate to its character in reference to each.' "
>
> Cross vs. North Carolina, 132 U. S. 139.

This same doctrine was again laid down by this Court in the case of

> In re Loney, 134 U. S. 375,

wherein Cross vs. North Carolina, *supra*, and other cases were cited with approval, and the following language used by Mr. Justice Gray, who delivered the opinion of the court, to wit:

> "There are cases (the most familiar of which are those making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as the laws of the United States, and punishable by the judiciary of either. (Fox vs. Ohio, 5 How. 410; United States vs. Marigold, 9 How. 560; Moore vs. Illinois, 14 How. 13; Ex parte Siebold, 100 U. S. 371–390; Cross vs. North Carolina, 132 U. S. 131.)"

As to whether the Federal courts have exclusive jurisdiction of the offense charged against the plaintiff in error, our argument, in short, is this:

First—If the offense defined by Sections 518 and 519 of the Penal Code of the State of California is the same offense as defined by Section 5484 of the Revised Statutes of the United States, then Section 711 of the Revised Statutes does not give the Federal courts exclusive jurisdiction, because Section 5328 provides an exception to the operation of Section 711. Section 5328 of the Revised Statutes is as follows:

> "Nothing in *this title* shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

This section is to be found in Title 70 of the Revised Statutes, and in the same title is to be found Section 5484, which defines the offense of extortion by internal-revenue informers.

The case of People vs. Welch, 141 N. Y. 266, more clearly expresses our views in this behalf than we can express them.

To the same effect are

Houston vs. Moore, 18 U. S. 1.

Passenger Cases, 48 U. S. 555.

Second—But, we do not concede that the offense defined by the California statute and the offense defined by the Federal statute are one and the same offense. In this behalf, we call the Court's attention to the following matters.

Section 518, Penal Code of California, reads:

> "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, etc."

Section 519 of the same Code provides in part as follows:

> "Fear, such as will constitute extortion may be induced by a threat, either;
>
> * * * * * * * *
>
> "2. To *accuse* him * * * of any crime."

Section 5484 of the Revised Statutes of the United States provides:

> "Every person who shall receive any money or other valuable thing under a threat of *informing*, or as a consideration of not *informing*, against any violation of any internal-revenue law, shall," etc.

Com. vs. O'Brien, 66 Mass. 90, contains this statement:

> "The term 'charge and accuse' thus used, and in this connection, does not mean actually to charge before a Grand Jury or magistrate, but to impute to him these offenses falsely, as a means of inducing him to pay money to avoid such actual prosecution."

To the same effect are:

State vs. South, 5 Rich. (S. Car.) 493;

Robbins vs. Smith, 47 Conn. 188;

Robinson's Case, 2 M. and Rob. 141;

Rex vs. Gill, 1 Lew C. C. 305.

Our own Supreme Court must have taken this view of the statute, otherwise the indictment in this case would not have been sufficient,

but, although the information was attacked as being insufficient, the Supreme Court held that it was sufficient.

People vs. Sexton, 132 Cal. 37.

In other words, as the information charged Sexton generally with having made a threat to accuse Greenwald, such information did not carry any presumption with it that Sexton was to go before a magistrate, but simply to charge generally. That there is no presumption that he was to go before a magistrate, see,

People vs. Hoffman, 126 Cal. 366.

A person may be accused in public or private by any kind of publication, oral or written, and inside or outside of the courts, while "inform against" means by some proceedings or action in the courts of justice.

Bouvier's Law Dict.;
U. S. vs. Simons, 7 Fed. Rep. 709;
16 Am. & Eng. Ency. (2 Ed.), 323.

Respectfully submitted.

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10414

Supreme Court of the United States.

No. 155.—October Term, 1902.

John E. Sexton, Plaintiff in Error, vs. The People of the State of California. } In error to the Supreme Court of the State of California.

[April 6, 1903.]

Plaintiff in error was convicted in the Superior Court of the county of El Dorado, California, of the crime of extortion. Judgment was entered, and, upon appeal to the Supreme Court of California, it was there affirmed, and the plaintiff in error brings the case here for review.

The indictment upon which the conviction was had alleged that on June 20, 1898, at the county of El Dorado, State of California, one S. H. Briggs and the plaintiff in error—

" . . . did wilfully, unlawfully and feloniously obtain from one C. Greenwald certain personal property consisting of money, the property of the said C. Greenwald, to the amount and value of thirty dollars, with the consent of said Greenwald, induced by the wrongful use and exercise upon him of fear by means of a threat then and there made by the said John E. Sexton and S. H. Briggs to accuse him, the said Greenwald, of the crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein, contrary to the form, force and effect of the statute in such case made and provided."

After the finding of this indictment the defendant Sexton moved the court to set it aside on various grounds, the ninth being that the court had no jurisdiction of the offense charged in the indictment, nor of the person of the defendant, and it was contended that the Federal court alone had jurisdiction over the act for which he was indicted in the State court. The motion was denied and the defendant then pleaded not guilty. Upon the trial the jury found the defendant guilty, as charged in the indictment, and he was sentenced to be imprisoned in the State's prison for the term of two years.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the Court.

The record now before us raises but a single question for our determination, and that is whether the State court upon the facts alleged in the indictment had any jurisdiction over the subject-matter.

The plaintiff in error contends that the right of the general government to exercise jurisdiction over the crime of which he was convicted is exclu-

sive, and therefore the State court had no right to try him upon the indictment found in that court.

The act of which the plaintiff in error is alleged to have threatened to accuse Greenwald of committing is mentioned in section 3392 of the Revised Statutes of the United States, which makes it an offense to sell cigars unless in new boxes, with the exception therein detailed. Having created the offense above described, Congress also provided for the punishment of the offense of extortion by threats to accuse an individual of a violation of the provisions of that, among other sections of the internal revenue law.

Section 5484, Revised Statutes, provides that—

"Every person who shall receive any money or other valuable thing under a threat of informing, or as a consideration for not informing against any violation of any internal revenue law, shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The provision prohibiting the sale of cigars in any but new boxes is part of the internal revenue law.

By the twentieth subdivision of section 629, Revised Statutes, there is given to the United States Circuit Courts—

"Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of crimes and offenses cognizable therein."

The Revised Statutes also provide:

"SEC. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States:

"First. Of all crimes and offenses cognizable under the authority of the United States."

Upon these various statutes the plaintiff in error founds his contention that, as the offense which it is alleged in the indictment he threatened to accuse Greenwald of having committed is one which exists solely under section 3392 of the Revised Statutes, which creates it, and as section 5484 provides the penalty for extorting money by threatening to inform or as a consideration for not informing against any violation of that law, the authority to punish for extorting upon such grounds is exclusively in the Federal courts.

On the other hand, it is claimed upon the part of the State that the offense of which the plaintiff in error has been convicted was one against the State, under sections 518 and 519 of the Penal Code of the State of California.

Those sections provide that—

"SEC. 518. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

"SEC. 519. Fear such as will constitute extortion may be induced by a threat, either:

* * * * * *

"2. To accuse him, or any relative of his or member of his family, of any crime."

Upon this subject the Supreme Court of California said:

"In substance it may be said that defendant threatened to accuse Greenwald of violating the United States revenue laws, and under fear induced by such threat secured from Greenwald the aforesaid sum of $30. It is insisted that the facts alleged do not constitute an offense against the laws of the State of California, but, upon the contrary, constitute a crime exclusively within the jurisdiction of the Federal court. We find nothing in this contention. The defendant is charged with the crime of extortion, an offense directly within the jurisdiction of the State courts. He is not charged with a violation of a Federal statute, but with a violation of a State statute. He threatens to accuse a man with the commission of a crime. It makes no difference if that crime be one solely triable in the Federal courts, for defendant is not being tried for that crime. If he had threatened to have Greenwald arrested upon the charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offense would be one against the laws of this State. It would be extortion as defined by the Penal Code of this State, and this court would not be concerned as to whether or not defendant's crime was also punishable under Federal laws. The court finds no substantial defect in the indictment, and the demurrer thereto is not well taken."

The case of counterfeiting the money of the United States is excepted by statute from the law giving exclusive jurisdiction to the United States courts of offenses against the laws of the United States. (*Fox* v. *State of Ohio*, 5 How. 410; *Houston* v. *Moore*, 5 Wheat. 26.) It has also been held that the United States could punish the crime of counterfeiting coin under the Federal statute. The same act may be an offense both against the State and the United States, punishable in each jurisdiction under its laws.

The foundation of the claim of counsel for the State is the statement that the defendant was not tried for or convicted of an offense under the Federal statute, but the indictment simply alleged that he extorted money by threatening to accuse Greenwald of an offense under the Federal statute. It was the extorting of the money by reason of fear induced by the threat that constituted the crime, and that was a crime provided for by the State statute, and it is insisted that the State is not prevented from trying the individual under that statute because he might have been proceeded

against in the Federal court under a Federal statute (section 5484) of a somewhat similar nature; that the threat to accuse another of crime is the material matter in the State statute, and it is not material that the threat was pointed at a crime made such only by the Federal statute.

It is true that the offense of extortion by threats to accuse a person of a violation of any part of the internal revenue law is made a crime by virtue of the Federal statute. If there were no statute in regard to the sale of cigars other than in new boxes, as provided for in section 3392 of the Revised Statutes, a threat to accuse a person of doing such an act would not be a threat to accuse him of any crime, and hence would not be punishable. As the crime itself exists only by virtue of the above section and as the threat to accuse one of the commission of such an act is also provided for by another section, there might be some plausibility in the contention of the plaintiff in error that, under the Federal statutes above cited, jurisdiction of the United States courts was exclusive. We do not decide that such contention is well or ill-founded, nor do we express an opinion thereon, because we do not regard it as necessary for our decision in this case.

The section which makes it an offense to extort money under a threat of informing in regard to an alleged violation of any internal revenue law (section 5484) is contained in title 70, denominated "Crimes," in the United States Revised Statutes, and in that title is found another section, which provides that—

"SEC. 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Assuming that, but for this section, the State court would be without jurisdiction, we are of opinion that it takes the case out of the provisions of the other sections of the Revised Statutes above cited, namely, the twentieth subdivision of section 629, and section 711. Section 5328 must be construed as creating an exception to the general rule declared in these other sections in regard to the jurisdiction of the Federal courts. The New York Court of Appeals placed the same construction on that section, in a very well reasoned opinion prepared by Andrews, Ch. J., in the case of *People* v. *Welch*, (141 N. Y. 266–277.) Although section 3392 is the sole foundation for the creation of the offense which the plaintiff in error threatened to accuse Greenwald of having committed, yet the jurisdiction of the State courts is neither taken away nor impaired on that account. The State statute provides for the punishment of the crime of extortion, committed as therein described, and when the Federal statute creates the crime the threat to accuse a person of the commission of such crime becomes itself a crime under the State statute, and the Federal statute which provides for extortion does not take away or impair the

jurisdiction of the courts of the several States under their laws to proceed and punish as is therein provided for.

The jurisdiction of the State court over the crime of extortion when perpetrated under the circumstances stated in the indictment is at least concurrent with that of the courts of the United States.

The section (5328) was not intended to merely permit a State court to punish a different offense involved in the one act. It was intended to leave with the State court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject.

There is, also as we think, considerable weight to be attached to the contention that the Federal statute is not essentially the same as the State statute regarding extortion. In the State statute it is specified that the property must be obtained from another with his consent, and that such consent must be induced by a wrongful use of force or fear, while those words are lacking in the other statute. Without expressing an opinion upon the question whether the indictment and conviction could be sustained without the provisions of section 5328, Revised Statutes, we hold that, taking such section into consideration, the State court had jurisdiction in this case. The judgment, therefore, must be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.